Supreme Court, U. S.
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APPENDIX

Volume IV, Pages 1607–2401

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1560

UNITED STATES OF AMERICA, PETITIONER
v.
UNITED STATES GYPSUM COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MAY 9, 1977
CERTIORARI GRANTED OCTOBER 3, 1977

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DX (Brown) 41 3379
DX (Brown) 43 3380
DX (Brown) 45 3381
DX (Brown) 48 3383
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DX (Brown) 50 3387
DX (Brown) 51 3389
DX (Brown) 55 3391
DX (Brown) 57 3392
Watt: DX (Watt) 1 3394
Defendants' joint exhibits:
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DJX 2 3401
DJX 12 3403
DJX 14 3405
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DJX 20 3411
DJX 22 3413
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Q. ——then, you have diverse pricing, diverse transaction prices.

A. Yes, you have a dispersion of prices.

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[13,713] • • •

By Mr. DeLone:

Q. Mr. Miller, do you see the three charts, Defendants' Joint Exhibits 80 A, B, and C, which I placed before you?

A. Yes.

Q. Do those charts, each of them, show diversity and dispersion of prices in the Boston area—80–A, for the first third of 1969; 80–B, for the second third of 1969; [13,714] and 80–C, for the third third of 1969?

A. That is what the label is, Mr. DeLone.

Q. Well, that is what the label is.

Well,assuming that they are from Boston, do they show diversity or dispersion of prices in each of those thirds?

A. Oh, yes. They show transactions at a variety of prices for different quantities at the different prices.

• • • • • •

DISCUSSION

[13,744] • • •

The Court. Now I will hear argument on this other exhibit that has been offered.

Mr. Mellott. If Your Honor please, these documents are being offered—as I am sure Your Honor is aware—to have them in the record. I am not suggesting that they go out to the jury, but in the event that the prosecutor should refer to the fact that certain witnesses that the Government subpoenaed were not brought in as witnesses to testify on behalf of the defendants, we believe the record should contain information as to the fact that they have been subpoenaed by the Government, Your Honor.

I am not requesting and do not suggest that these exhibits go out with the jury, or that the jury even be told about them. But if we have—depending on what is said by Government counsel in the closing, we may need to refer to this fact.

[13,745]

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Mr. FRICANO. I fail to see how, whether—as this Court has said time and time again—whether a witness is subpoenaed or whether he isn't subpoenaed, how that becomes relevant in the case.

The COURT. We will save argument again.

The objection is sustained.

• • • • • •

[13,747] The COURT. • • •

We will say we will consider the motions for judgment of acquittal on Friday morning at 9:30.

And at the same time I am going to outline to you my charge, as I said, and I am going to rule on your points for charge.

I'd like to explain something in that regard. It is not my practice to read points for charge to the jury. I either incorporate the requested matter in my charge in my own language, or I deny the point.

For that reason I will deny as stated all points which I charge in substance, but will tell you that I have charged it in substance. If I haven't charged it at all, if I denied it totally, I will tell you that, too.

• • • • • •

[13,756] [Court was reconvened at 9:30 a.m. o'clock. The jury was not present.]

The COURT. Gentlemen, I received this morning certain motions to strike testimony. They were not filed in a timely manner. Furthermore, they are merely repetition of things I have previously ruled on. They are all denied.

Have motions for judgement of acquittal been filed by everybody?

They are denied.

Now, I want to discuss with everybody the nature of the charge that I intend to give in this case.

The Government has presented 22 points for charge. Each of these charges is denied as stated.

In my preliminary charge to the jury, I informed them, and of course counsel was also informed thereby that I had no intention of commenting in my charge on specific evidence offered by any of the parties, what anybody contends the evidence should be or what inferences anybody should draw from that evidence. That is the basic reason I have denied the 22 points filed by the Government. They are denied as stated.

I intend to charge in substance as to the requests on law made in each of those 22 points. I am not charging, [13,757] of course, on the comments that were requested on the evidence.

Now this applies as well to the points for charge submitted by the Defendants. All of them are denied as stated for the reason that I have given. They asked for comments on evidence. They asked for conclusions to be drawn from the evidence and I am not going to do that.

I am going to go through the points for charge, however, the Defendants' points for charge, and tell you which of those I intend to charge in substance. That is, I will charge on the law as stated. I am not going to use the exact language, but I am going to charge in substance deleting the comments that was requested on evidence, and deductions from evidence.

I feel that when a judge does that, by stating one thing he might appear to the jury he has over-emphasized that and when he does not comment on some other phase of evidence that might be important to the jury, they could reach the conclusion the Court thinks that is unimportant. For that reason, I am not going to do that.

The introduction as requested will be given in substance.

Requests 1 through 3 will be given in substance.

Requests 4 and 5 are denied as stated.

Request 6 will be given in substance.

[13,758] Requests 7 and 8 will be given in substance and denied as stated in part.

Request 9 is denied as stated.

Requests 10 and 11 will be given in substance.

Request 12 is denied as stated.

Requests 13, 14 and 15 will be given in substance.

Request 16 is denied to the extent that I do not give it in substance.

Request 17 is given in substance.

Eighteen is denied to the extent that it is not given in substance.

Request 19 is denied as stated, to the extent that it is not given in substance.

Twenty is denied as stated.

Twenty-one through 25 are given in substance.

Twenty-six is denied.

Twenty-seven through 32 are denied as stated, to the extent that they are not given in substance.

Thirty-three is denied as stated.

Thirty-four is given in substance.

Thirty-five is given in the main in substance and denied to the extent that it is not.

Thirty-six through 38 are given in substance.

Thirty-nine is denied as stated.

[13,759] Forty through 51 are given in substance.

Fifty-two through 54 are denied as stated.

Fifty-five and 56 are given in substance.

Fifty-seven is denied as stated.

Fifty-eight, 59 and 60 are given in substance.

Sixty-one and 62 are denied as stated.

Sixty-three through 69 are given in substance.

Seventy is denied.

Four additional requests for jury instructions by Defendant Georgia-Pacific are denied as stated, except insofar as they are given in substance.

The additional requests for jury instructions of Defendant National Gypsum is denied as stated, except insofar as it is given in substance.

Now as to the charge itself, I intend to introduce the charge by telling the jury they must consider the charge as a whole and not consider the individual statements in the charge independently of the charge as a whole.

I will tell them also in the introduction that they must follow the law as I give it and they are not to be concerned with their own thoughts as to the wisdom of the law or what the law ought to be. I will also tell them they are the sole finders of fact, what that means, arguments or statements of counsel or the Court are not to be treated as impinging on their prerogative as the sole finders of [13,760] fact. They are intended to help them, to point up issues, but that the jury must reach their own conclusion and they are not bound by any feeling they might have as to any opinion I might have.

First of all, I don't have an opinion, and I am neutral in the matter; that if I ask any questions, I did so because I thought something ought to be brought out, and not to indicate any opinion on my part.

And, furthermore, if they think I have an opinion, since I could state it to them directly, I am not going to do it secretly or by any other means. And this is their duty and theirs alone.

Then I will go into the province of the jury. I will tell them what is the evidence they must consider, being the testimony of the witnesses and exhibits and they should not pass on anything they heard outside the courtroom or anything they might have learned in any other way except through the evidence and the exhibits.

I discuss the fact that people who made objections had a duty to do so and they should not take any umbrage against the attorney or his client because there was an objection; that is the way things come before the Court for decision; that any evidence which was ordered stricken and excluded must be disregarded by them entirely.

I will explain again the nature of the side bar [13,761] conferences and tell them again the requests for side bar conference is a proper request and they should not consider that there was anything wrong if an attorney asked for a conference at side bar, being when they were excused, and they should draw no inferences or should not be prejudiced against anybody because of such a request.

I also will tell them that the results of the case are not to concern them; that sentencing is solely the province of the Court and that they must not in any way be concerned with that; that after they reach their verdict, that is the end of anything they have to do.

I will also tell them that they are not limited to the words of the testimony or the exhibits; they are permitted and expected to draw those inferences therefrom which they deem to be appropriate.

I will also talk to them about evidence which was admitted for a limited purpose and tell them any evidence which was admitted for a limited purpose cannot be considered properly by them for anything but the limited purpose for which it was issued.

I will also discuss for want of a better term, the Celotex documents. What I am referring to is the policy of destruction after a certain period of time; pointing out there is nothing to indicate that was done improperly and it was only admitted for the purpose of explaining the [13,762] absence of certain

Celotex documents, if there were any absent which they think should have been present and it serves no other purpose.

[13,763] Mr. McSweeney. If Your Honor please, may I just point out that it is a policy of retention, that it required they be retained. It isn't required they be destroyed.

The Court. I am aware of that.

Mr. McSweeney. Yes. Thank you.

The Court. I said that I am not discussing, this morning, the exact language I am going to use.

Mr. McSweeney. Fine.

The Court. Because I have an outline that I have, and the precise language you will hear when I hear it—that is, when I say it.

Now, I am also going to discuss tables, charts, and summaries, discuss what the purpose of those is, and what standards they should use in weighing the value of tables, charts, and summaries.

In essence, I expect to tell them that this is done where evidence is of a massive nature and could not be properly understood except by such a table, chart, or summary; that this is merely a method of making available to them for their consideration in graphic form the contents of a large number of documents which couldn't be really passed on to them in any other way. They must weigh—there is some testimony that the charts—there is some contest as [13,764] to the accuracy of the charts and the summaries. They must weigh that, determine whether the charts and summaries were or were not accurate. If so, whether any accuracy that there was was material or not material, whether it would have changed the effect of the chart or would not have changed the effect of the chart.

In other words, they have to use that in determining what weight they are going to give tables, charts, or summaries.

I also expect to tell them about expert testimony, pointing out that in certain fields, although, ordinarily, we don't allow opinions, in certain fields, where the jury could be aided by an opinion by somebody having expertise, a qualified person is permitted to express such an opinion; that he does not vouch for the truth of his opinion, but only vouches that that is his honest opinion from the facts stated; and, in passing on the expert's testimony, they have to consider what evidence he

had, on what he drew, the basis for his opinion, his own qualifications, and what weight they want to give to that opinion.

I am also going to point out that they heard certain reading from certain Grand Jury transcript; that, in the main, that was done not to provide them with substantive evidence but for the purpose of refreshing recollection or for the purpose of impeachment, and they should not consider [13,765] this anything but that; but, in certain instances—in one instance, in particular, the testimony was given—that was the man that's dead—and, in that instance, it was read to them as substantive evidence and not for the other purposes.

I am also going to charge on opportunity evidence—that's meetings, parties, trade association activity—and I intend to tell them that the fact that somebody got together, absent proof of anything else doesn't prove anything. It proves merely the opportunity to have reached some kind of agreement, but nothing more than that, and they can't conclude that there was an agreement merely because somebody had an opportunity to talk to somebody else or did talk to somebody else, and that that would be relevant only if, following such meeting, something occurred from which they conclude that the opportunity was used for an improper purpose, and that that is basically—that there is nothing illegal about competitors talking to each other. There is nothing illegal about trade associations or about discussions there, but that they must examine all the surrounding circumstances to determine whether these opportunities that were available were used for an improper purpose.

I am also going to talk to the jury about the assistance and advice of counsel, pointing out that they heard that for the purpose of helping them decide whether or [13,766] not the person who received the advice did anything wrong, he having been advised by counsel that he shouldn't do certain kinds of things. This can help them in reaching their opinion as to whether he did it after receiving that advice, but that the fact that an attorney gives you advice, if that advice is to do something which is illegal, it is no defense at all that they did it with advice of counsel.

I am also going to attempt to explain to them the difference between direct and circumstantial evidence, defining each of them, telling them, of course, that either or both are sufficient to convict, and that one is of no higher quality than the other;

that they must—that, in some instances, circumstantial evidence is more reliable than the direct evidence, and, in other cases, it isn't, and they must consider that and decide, using both types of evidence, the questions that are presented.

I intend to discuss the burden of proof, pointing out, of course, that the burden of proof is on the prosecution.

Mr. Mellott. Your Honor, I don't know whether you want us to interrupt.

The Court. I do not.

Mr. Mellott. All right.

The Court. Anybody who has any objections to any of my charge may submit their objections in writing, and I will then have the opportunity to consider [13,767] them.

I intend to charge, of course, on reasonable doubt and the presumption of innocence. These are pretty much boiler-plate types of charge.

I am going to discuss the indictment itself and the fact that that isn't evidence, tell them that it is their duty to pass on the credibility of witnesses, give them certain standards by which they can do that; that is, of course, the man's appearance in court, the way he testified, whether he appeared to be truthful or untruthful, his opportunity to know what he says he knew, his interest in the case, if any, how they should treat it, as, of course, the fact that it doesn't necessarily mean somebody isn't truthful merely because they are interested, it merely means that they should weigh the testimony a little more carefully.

I am going to discuss discrepancies in testimony, tell them that they should, if they can, try to harmonize what appears to be discrepancies, because, sometimes, what appears on the surface to be a discrepancy is not, really, when you consider it, and, of course, if they finally—if they can't harmonize it, if they can't reconcile the discrepancies, then they are just going to have to decide which one they believe.

I am going to instruct as carefully as I can that the—each Defendant is entitled to separate consideration as to [13,768] innocence or guilt, and, in that regard, I am going to tell them that, of course, they know that certain of the charged conspirators are not here on trial, and they should not speculate in any way as to why they are not here on trial or place any weight on that whatsoever.

I am going to point out, of course, the corporate Defendants are persons, insofar as we use that term here, and they are entitled to the same consideration as an individual Defendant.

I am going to tell them what the charge is from the indictment. I am going to explain the nature of the charge, that it is a charge of conspiracy to fix, maintain, and stabilize prices, terms and conditions of sale.

Then, I am going to discuss what has been called means and methods. There are no overt acts required in a Sherman Act conspiracy, but the Government saw fit to set forth in the indictment certain means and methods, and, having seen fit to do so, they have got to prove some of them. If they didn't want to do it, they wouldn't have had to; but, having done it, they have to prove it.

I am going to tell the jury that, first, they must determine whether or not there was an agreement—in other words, was a conspiracy or an agreement entered into—and point out, too, that that could have been done before or during the so-called statutory period, but there must be, first of [13,769] all, proof of a conspiracy, and there must also be proof of joinder in that conspiracy by each of the Defendants before they can be considered a part of it, and that their individual joinder of the Defendant must be proved by—I am not going to use this term to the jury—by evidence aliunde. They can't consider one person's statements against anybody else unless it is determined first that there was a conspiracy and that that person joined it.

I am going to tell them, then, of course, that there must also be proof that the conspiracy continued within the statutory period, because, if it didn't, no matter how bad anybody might have been, they can't be found guilty—and I won't say it in those kind of terms, but I am going to try to make clear that, regardless of what happened beyond the statutory period, that's for the purpose of determining whether there was a conspiracy which was a continuing conspiracy, but there must be proof that something occurred within the statutory period, and there must be proof of some act within the Western District of Pennsylvania within the statutory period in furtherance of that conspiracy.

Now, there appears to me to be five categories of the so-called means and methods, and I am going to not charge as to each individual method or means, but I am going to treat them as within those categories.

I call it, for want of anything else, the first [13,770] one of those, the published price list contentions; the second is the job price protection; and the third is verification; and the fourth is material handling; the fifth is predatory conduct.

Now, those are the charges, the five categories, as I see it, in the indictment itself, under the method and means definition of their description of verification. I expect to explain the Robinson-Patman Act and the good faith meeting of competition the fact that verification is not illegal if it is done for the purpose of a good faith effort to avoid discrimination. If, on the other hand, it is done for the purpose of fixing—and I am not going to use the language "purpose"—if it is done with the effect of fixing, maintaining, and stabilizing prices, then it is a violation.

[13,771] And, of course, the jury is going to have to determine just what the effect of the verification was. Was the effect of it to fix, maintain, and stabilize price, or was it a good faith effort to avoid a violation of the Robinson-Patman Act?

I expect to tell the jury that intent and motive and Sherman Act offense are immaterial, but there need not be one if there was agreement and that agreement had the effect of fixing, maintaining, and stabilizing prices, then it would be a violation of the law.

I am going to discuss the Statute of Limitations, discuss the "on or about" provision, and explain what that means, point out that there is a date when the—and anything behind that is barred by the Statute of Limitations, and reiterate that there must be proof of something within the statutory period.

I am going to discuss the Sherman Act, the purpose of the Sherman Act.

I am going to tell them that interstate commerce is not a question for their determination in this case, because it appears that has been agreed by everybody, that gypsum—the sale of gypsum board did affect interstate commerce.

And I am going to tell them what must be established to show an overt act in the Western District of [13,772] Pennsylvania. The conspiracy doesn't have to have been entered into here, but, if there were sales of gypsum board in this district, the prices of which were fixed as a result of an agreement, that would be an overt act, or that would be sufficient connection with the Western District of Pennsylvania.

I am going to define a—define conspiracy. I am going to point out that there has to be proof and agreement between two or more persons, and, of course, as far as we are concerned, one of them has to have been one of the Defendants in this case; otherwise, there would have been nothing; but if one or more Defendants in this case conspired with one other person to do the thing which the law forbids, that is the nature of the conspiracy that we are talking about.

I am going to point out that the gist of the offense is agreement; that there must be proof of agreement; that no—that mere similarity of conduct isn't sufficient, that the mere fact that two companies charge the same price for fungible goods is not sufficient to show a conspiracy, and an inference of conspiracy could not be drawn solely from that; that there is no kind of formality necessary—people don't have to have agreed either in writing or by words; if they did so by—if they did that by implication, that is sufficient.

[13,773] I am going to tell them that it isn't necessary to prove all the methods and means that were set forth, but there must be proof that one or more of the methods and means set forth in the indictment were actually done.

I am going to define "knowingly."

I am going to discuss joinder of a conspiracy and what has to be proved to show that any particular Defendant did join such a conspiracy; that declarations or acts of conspirators would be binding on their other coconspirators but only after there was proof (1) of conspiracy and (2) of joinder in that conspiracy.

I am also going to discuss withdrawal and abandonment of a conspiracy, pointing out that mere inactivity isn't enough. There must be some positive termination of the conspiracy, either by acts or words, which indicate that this person is no longer party to it or is withdrawing from it or by, of course, discussing it with the law enforcement officials.

I am going to attempt to define price fixing conspiracy, the elements of it, pointing out, of course, that motive is immaterial, and I am also—as to individuals, I am going to discuss—as to corporations, I am going to discuss agency and authority of the person who is charged—of the corporation—the person who did whatever was done, if anything was done, had to be acting within his authority. [13,774] That isn't a very great

problem in this case. One of the Defendants is the Chairman of the Board of the corporation, and the other defendants are high officials in the corporation, so what they did, they undoubtedly—if they did anything. I don't think there is any serious question of their authority to do that, and I am going to point out, though, anything that binds a corporation must have been done by somebody who had authority to do that, so that if somebody did or said something without authority, outside of his authority, that couldn't bind the corporate Defendant.

As to individuals, of course, they are responsible for their own acts, and they are responsible for the acts of others if they authorized, approved, or condoned those things; otherwise, they would not be.

That, in essence, gentlemen, is the—is an outline of the charge which I expect to give.

As I say, I am not—I am not giving any express language on it, because I reserve the right to change that, and it may be that, during the—having heard this, some of you will want to submit something objecting to something I have said I am going to charge.

I will consider that during the week I have before I give the charge; and, of course, after I give it, you will have an opportunity to make a request for additional charge or object to anything that I have said if you don't like [13,775] the specific way in which I do say it.

In inviting your comments on what I intend to charge, please do not repeat requests for analysis of evidence and a discussion with the jury as to what I think problems are as a result of that evidence. That is for you gentlemen to tell, as I am sure you will. You are supposed to do that in your closing arguments. That is nothing I intend to say or will say, so it is just a waste of time for you to write that out again. However, as to matters of law, which I do intend to charge on, I invite your suggestions.

[13,776] Mr. MELLOTT. May we have an indication as to when you would like those objections filed, Your Honor?

The COURT. Well, you better do it within time to give me time to consider it.

Mr. MELLOTT. Well, I wonder if you could give us a day?

The COURT. Well, I would not want to have anything submitted after Wednesday of next week. Now, of course, I recog-

nize that when you hear the charge given you all have a right afterward—and we will excuse the jury—and give everybody a right then to object or request additional charge.

But if, as a result of my outline, you have something now that you know you would like to say, I am going to request it in writing; because, to try to do it orally would be productive of nothing. We'd just have a debate for the rest of the day.

Mr. MELLOTT. Yes, sir.

Mr. BARTLIT. I don't mean to interrupt. Apropos your invitation, I have two written suggestions which I would like to give to you.

The COURT. If you will give them to Mr. Burr, I will get them and we will then take them into consideration.

[13,777] Mr. BARTLIT. Well, this is for Andrew Watt, Your Honor, and not for anybody else.

The first is on Robinson-Patman, Your Honor, and it is the charge which was given in the Gray Companies and approved by the Ninth Circuit.

The COURT. Well, I may have already more or less decided that's what I am going to do.

Mr. BARTLIT. Yes, sir.

The COURT. And, as you see when you read your points, and see what I say, I am going to give it in substance. What I mean is that I am going to use that kind of a charge. I am just not going to say it exactly that way and I am going to delete references to evidence.

Mr. BARTLIT. I understand that, Your Honor. The reason I am filing the Gray charge—Two reasons: I think the charge we submitted was correct. This one is shorter and simpler, and I have in mind obviously the situation.

And, secondly, I think that the Government charge, if the effect is to stabilize, I think that that isn't the law and this doesn't say that, so that's the second reason why I am submitting this particular charge.

The COURT. We will consider whatever anybody submits.

Mr. BARTLIT. The second one I am [13,778] submitting is one on the retroactivity of the effect of the Container Case.

The COURT. Okay.

Now, during the closing arguments and during the charge of the Court, there will not be a running transcript, because I don't want changing of reporters during that. You can change after

any individual has finished; but I want one reporter to take the total closing of any attorney, and I want one reporter to take my total charge, so that we won't be distracted by people coming in and out during the closing statements or during the charge.

Mr. MELLOTT. If Your Honor please, could I suggest an amendment to that? When it runs over the recess, could we have a change at the recess?

The COURT. I don't object to that. A change at recess I don't object to.

I do strongly object, when somebody is making a closing statement, to having somebody come in and out. I object very strongly to it during my charge.

Mr. MELLOTT. I understand that. If it runs over a recess, that won't interrupt it then.

The COURT. No, no. The change at recess I have no objection to.

In that line, I will take recesses at the normal time. In other words, in the morning we will have a [13,779] morning recess, we will have a noon recess, and we will have an afternoon recess. And for that purpose we will interrupt the closing arguments.

I will also do that with my charge, so that the jury isn't going to be sitting there for a long period of time.

All right, fine. Thank you.

We will recess now until . . .

Mr. DELONE. I wonder if I could ask—I understand Your Honor doesn't want argument at this time, and we will not make it. I want to ask a point of—I guess it is clarification—going back to the McCarthy days.

Your Honor in a number of instances has indicated that certain points are denied as stated; and in some has said that you will give the substance, and others you have not. Where you have not indicated you will give the substance . . .

The COURT. Then I am not.

Mr. DELONE. It is a denial? We should treat it as if it is denied in total?

The COURT. It is denied, because I consider that it is basically requesting comment on testimony or on facts or contentions of the parties, and I don't intend to do that. I think that's the job of the attorney [13,780] in his closing to tell what he thinks, what inferences he thinks the jury should draw from

certain facts which he thinks they should find. And I am not going to do that.

Where that was requested, I have merely said it is denied as stated. But where I am going to call from that the legal matter, then I have said so.

Mr. DELONE. That enables me to understand the gist of the rulings as you have indicated. Thank you, sir.

The COURT. Well, sometimes with propriety you repeated things in three different requests.

Mr. DELONE. That's right.

The COURT. Well, I am not going to give it three times, so I have denied it. I am going to give it at some other time. But, I think as you look through it you will see that the points of law are mainly, as requested, going to be given in substances, given by both parties.

The requests as to fact situations, the request as to comment on evidence, or the request to tell them what inferences they might draw, I am not going to give in any substance. So that in your closing remarks I am sure that you will do that for me. Or, not for me, for your clients.

Mr. MCSWEENEY. Your Honor, I have a question also. [13,781] Your Honor mentioned that you would, with respect to means and methods, classify them in some five categories. Do I understand that your charge with respect to means and methods will be merely summarizing what the means and methods are?

The COURT. That's right. Not what they are, what they are alleged to be.

Mr. MCSWEENEY. What they are alleged to be. Well, that's all they are, of course, allegations.

The COURT. Yes. I am going to tell them that they are the five classes of things which the Government says one or more—they say all of you did it, and they have to establish that at least as to one of them you did do it.

Mr. MCSWEENEY. I see.

The COURT. I go back to the Kram Case where they said, when I was U. S. Attorney, that I didn't have to come up with all those details, but since I did it I had to prove it.

Mr. FRICANO. Judge Weinfield—I don't know if you know Judge Weinfield or not, Your Honor. But, one time I appeared before him in the Southern District of New York a number

of years ago. It was in the Steel Castings Case. And I had provided a voluntary Bill of Particulars. And I came before him objecting to the remainder [13,782] of the Bill or the remainder of the motion. And he said, "Mr. Fricano, I would have denied this motion out of hand, but you volunteered. Now you are stuck with it."

The COURT. That's what I am saying about your manner and means. You volunteered it so now you got to prove it.

Mr. BARTLIT. Your Honor, as a matter which relates to the arguments which begin on Monday, I think that in representing Mr. Watt, that enough has been said about the Grand Jury and 23 people voting, and that sort of thing.

The COURT. I am not going to say that.

Mr. BARTLIT. I know that, Your Honor.

The COURT. I am merely going to say to this jury that, in effect, that the indictment is in evidence and shouldn't be considered as evidence. It is a charge.

Mr. BARTLIT. Yes, sir. And I think that's proper, and none of the defense counsel are going to argue anything about the Grand Jury. And I think that the decisions are clear that for the Government to say anything about local people having voted in the Grand Jury——

The COURT. I think Mr. Fricano knows not to do that.

[13,782[a]] Mr. BARTLIT. ——it is error.

The COURT. I think he knows.

Mr. BARTLIT. Well, he has done it before, Your Honor.

The COURT. Well, he has reformed.

Mr. FRICANO. Did I do it in my opening, Your Honor?

The COURT. No.

Mr. FRICANO. Of course I didn't.

Mr. BARTLIT. We are not going to invite it, Your Honor.

The COURT. I think that's clear that nobody can say that "You members of the jury are just like the Grand Jury that returned an indictment. And, furthermore, you had to pay more for your house because the price was fixed on gypsum board."

I think Mr. Fricano knows that he can't do that.

Mr. FRICANO. I appreciate Mr. Bartlit's kind instructions in that regard.

The COURT. I am saying what Judge Gibbons of the Court of Appeals once said about me. He said that I will follow the law.

Mr. KECK. Your Honor, may I ask one question?

The COURT. I told Mr. Burt that I [13,783] was going to say, "We are now recessed." and get up and walk out. I didn't succeed. I didn't get up fast enough.

Mr. KECK. May I ask Your Honor a question?

The COURT. Yes.

Mr. KECK. In your reference to the suggestion that you are going to comment on the charge of the jury, Your Honor left out the word that we are charged with, "Raise," fix, maintain, and stabilize prices.

The COURT. Raise, fix, maintain or stabilize.

Mr. KECK. And there is a difference in there between prices and terms and conditions of sale.

The COURT. Yes. But the "and" is a "or."

Mr. BARTLIT. Not in this indictment, Your Honor.

The COURT. They do not have to prove that all four of those were done, only one of those things.

Mr. KECK. Yes. But if they do not see the indictment——

The COURT. You want the word "raise" put in. We will put it in.

Mr. KECK. That's my point.

The COURT. All right, we will put it [13,784] in.

Anything more in that line, though, I would appreciate being done in writing.

Mr. KECK. I couldn't determine whether Your Honor was deliberately or inadvertently leaving out the word "raise" in his comments this morning.

The COURT. No. I intended to tell them that the conspiracy has to be the one to raise, fix, maintain, or stabilize prices, and I am going to use the word "or," because I don't think that they have to prove all four of them. They have to prove one of them.

Mr. MELLOTT. We were charged with an "and," Your Honor, and I think that's what should be used.

The COURT. Mr. Mellott, the courts have said time and time again that this is the disjunctive and not conjunctive, and that's the way I am going to charge.

If I am wrong—Go off the record for just a moment.

[Discussion held off the record.]

Mr. MELLOTT. Your Honor, the reason I got on my feet was to suggest that we rearrange the room a little for the closings

and the summation. I'd like to suggest that we turn this table around and move all the tables that way.

The COURT. You want to all face the [13,785] jury?

Mr. MELLOTT. All face the jury. And we will have more room in front of the jury box.

The COURT. It is all right with me.

As long as you people can agree to it, fine. Fix it up any way you want. You can put hooks on the ceiling and hang chairs up there if you can all agree.

All right.

We will recess now until Monday morning. I don't think there is anything pending. We will recess until Monday morning at 9:30.

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[13,790] • • •

The COURT. Defendants' motions filed at five minutes to 5:00 on Friday evening, June 27, are denied.

You may open to the jury—may close to the jury, Mr. Fricano.

Mr. FRICANO. Thank you, Your Honor.

The COURT. I will file a written opinion in due course.

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PROSECUTION CLOSING ARGUMENT

[13,798] Mr. FRICANO. We will get to that in great detail. Regardless of the place or the mode of communication, wherever they occurred, what does show up clearly from these communications and contacts, and it bears out the observation by Adam Smith, who wrote the Wealth of Nations—and Dr. Cyert, the defendant's own expert classified Adam Smith as the father of economics—now his famous work, which was published in 1776, the year of our nation's birth, Adam Smith states,

> People of the same trade seldom meet together even for merriment or diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices.

Let me say that again.

> People of the same trade seldom meet together even for merriment or diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices.

Folks, that was written in 1776.

The evidence in this case will demonstrate, while it was true then, it is equally true, and perhaps even more true today, as the evidence in this case will demonstrate as we go along.

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[13,807] • • •

Folks, I don't submit to the same explanation that Dr. Cyert did. Do you remember when Mr. Thorson asked Dr. Cyert about the quote from Adam Smith about merriment, contrivance to fix prices wherever the Defendants met? His answer was—I want to read this right to you from the transcript. Okay. That goes back to Adam Smith, whose book came out in 1776. "If you asked me, have I observed it, no, I have not observed it, and I don't think it is true. I think most of the time they tell dirty jokes." I don't subscribe to that. What they were talking about was not dirty stories, but prices and profits; and we will go on and demonstrate it right now.

Texas Gypsum—that is where it started. That is where it really started, right there, when Mr. Huckleberry, the innovator, Mr. Huckleberry, the man who took the stand—and I am sure you all remember him well—said, "I built the plant with my own two hands." It had never been done before. He had a dream. He had a plan. It came to his mind as early as 1957. What was the plan? Trucking—something which the Defendants had resisted continuously. They wanted to maintain that status quo, that hallmark of collusion that Dr. Cyert talked about.

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[13,811] • • •

Now, after Malcolm Meyer came down and was refused by Mr. Huckleberry, other members of this tight little club also came and visited him and tried the same trick.

You may recall testimony that Mr. Huckleberry gave concerning the visit by officials of American Gypsum. Now, Amer-

ican Gypsum, if you recall, in 1960, was another new entrant into the gypsum industry, another new, single-plant producer; but, unlike Huckleberry, it made up with USG. You will recall even Bear admitted to this—that Quayle, one of the officials who went down and visited Texas Gypsum from the American Gypsum Company also visited Mr. Bear, prior thereto, at United States Gypsum's headquarters in Chicago, at which time they discussed prices.

Now, Mr. Bear said it was only buy/sell; but, folks, you've got the common sense—when two companies are talking buy and sell of the same product, they are talking prices, not only that they are going to charge one another, but those prices necessarily have to relate to market prices. It couldn't possibly be otherwise. Think. Your good common sense will show you that. So even Mr. Bear admits that Quayle was there.

Now, Quayle goes down after his boss, Hardin, had gone down and told Mr. Huckleberry, "If you don't join up, [13,812] you are going to get killed." Remember that testimony by Mr. Huckleberry? "You are going to get killed," he said.

Huckleberry sent Mr. Hardin on his way. Then Mr. Quayle, second emissary from American Gypsum, came down and, in essence, told him the same thing: "If you don't join the Gypsum Association, if you don't stop this trucking activity in your principal marketing area in Texas, you are going to get killed, because you cannot withstand the power of these corporations."

Again, Huckleberry said, "They wouldn't dare do that. They will get caught."

Mr. Bear's reply: "They don't care. They will do it."

Folks, they did, ultimately.

[13,813] Mr. FRICANO. Now, what corroboration do we have on Mr. Huckleberry's testimony with respect to the Quayle and Hardin visit? We have the corroboration that has been read into this record as to what Mr. Quayle testified to at a prior case.

Now, you will recall that Mr. Huckleberry, when Quayle visited him, set up a tape recorder. Now, that tape recording is not here. It is not in evidence, but he did set up a tape recorder to tape what Mr. Quayle was going to say, because his lawyer said, "Protect yourself. Get his actual words."

Now, ultimately, Quayle found out that he was tape recorded. What did he do with that information? Did he keep it to himself? No, he brought it back to the club, by his own testimony in this record. When he found out that he had been taped by Huckleberry, he went back and he told Don Miller, from Celotex, John Brown, of National Gypsum, Bud Storey, of Flintkote, last but not least, good old Al Meyer, of Bestwall.

Now, why did he tell those people he had been taped? In fact, not only had he told them, but he said in addition thereto, that they already knew about it. Folks, those people were worried. Those people were worried.

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[13,827] • • •

As we go through with respect to each of these defendants, I will prove to you through the evidence in this case that all three of these defendants—I can't soften this—lied on that witness stand.

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[13,829] • • •

In fact, I think I should point this out to you right now—and this is unrefuted in the record—Mr. Van Cleve testified as late as January, 1972. Ted Armstrong, Sr., was having a price discussion over the telephone with Don Miller of Celotex. As late as January, 1972, well into the statutory period, Mr. Van Cleve, also identified as one of the persons with whom Mr. Armstrong had such pricing discussions, Andy Watt. There is not one scintilla of evidence in this record to show Mr. Armstrong didn't continue those same pricing discussions with Mr. Watt right straight through to at least January, 1972.

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[13,833] Mr. FRICANO. • • •

Remember in 1964—a fellow by the name of Mike Simpson, formerly a President of Republic Gypsum Company, testified in this case, and he told us that he and his father and two brothers got an idea back in the early 60's, because they had been in the building materials business, they had a dream of

building a wallboard plant that could serve the southwest and ultimately expand out even further. They couldn't find any financing until the Area Redevelopment Authority came along, and, ultimately, between the Simpsons own money, which they stuck into their plant, and a loan they got from the ARA, they were able to start plant construction in October, 1963, and the plant came on-stream and [13,834] actually started producing wallboard in October, 1964. This was another independent producer in the southwest the major producers could not ignore, so what happened? Mr. Simpson got a visit from Mr. Abnee and Mr. Yeager, and Mr. Abnee was our first witness in this case.

• • • • •

He was the Executive Secretary, the Executive Vice-President of the Gypsum Association. They tried to convince Mr. Simpson he should join the Gypsum Association, and Mr. Rhyne Simpson didn't give them a comment at the time, but, ultimately, he did join the Gypsum Association, and we will get to that in a moment, as it involves the defendant Watt.

Now, the Simpsons knew about Huckleberry and the problems which he had confronted or been confronted with, but they weren't going to be as stubborn as Mr. Huckleberry. Pursuant to the visit by Mr. Abnee and Mr. Yeager, they did join the Gypsum Association, so here was Mike Simpson, 27 years old. With his wife, he goes to the first Gypsum Association meeting, which was held at the Broadmoor in October, 1964, and you will recall, in the fall of the year, the Gypsum Association met at—I think I called them plush resorts, once—whether they are plush or whether they are not, they are resort areas, and you will recall Mr. Watt testifying that, when he goes to these in the fall of the year, he is accompanied by his wife. Mr. Simpson [13,835] had his wife there.

I think, when I was cross-examining Mr. Watt about whether he played cards at these meetings and so forth and so on, he said, "Well, these meetings in the fall are pretty well took up because I have my wife there." Remember that, "I have my wife there," but he found time—Mr. Watt found time, on the evening of the banquet, to pull Mr. Simpson aside, and he said to Mr. Simpson,

> There is a practice in this industry of exchanging prices, be honest.

The wives are there. The banquet is there, but Watt finds time to pull Simpson aside to tell him this, "There is a practice in this industry of exchanging prices, be honest." That is unrefuted.

Mr. Watt never denied it. That is another piece of unrefuted evidence in this case.

Simpson's introduction to the club, to the agreement to exchange prices, was through the Defendant Watt, and something further that is unrefuted, the Defendant Watt, either before this meeting with Simpson in this resort or immediately thereafter, told everyone that Mr. Simpson was now in the club.

How do we know that? Mr. Simpson testified, unrefuted, that, shortly after he got back to Dallas, and he told his father and his brother about Mr. Watt's conversation [13,836] the fact they didn't understand what he was talking about. Mr. John Brown of National Gypsum called and said,

> Are you charging such and such a price to such and such a customer?

Now, at that time, it became clear to Mr. Simpson what the practice in the industry was, but Mr. Brown never told him. How did Mr. Brown find out that Mr. Simpson was now going to answer questions? He found out because Mr. Watt told him. That is how he found out. Mr. Watt told Mr. John Brown, just as he told the others,

> You can now call Simpson and Simpson will call you because he is now part of our agreement.

Unrefuted. Watt took the stand and never said a word about it.

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[13,849] • • •

But let me tell you this right now. I believe I [13,850] will be able to demonstrate from the contemporaneous documents the true purpose of these discussions—and they were discussions. Remember, they kept saying, "Just ask about a particular price to a particular customer, and a yes-no."

Well, the contemporaneous documents—which I will read to you—will show that there was a complete and full exchange of pricing information for the purpose of fixing, maintaining, and stabilizing prices. That the Robinson-Patman Act defense was

one that was dreamed up for this lawsuit. I am going to be able to show you that with the contemporaneous documents.

Now, on those contemporaneous documents you must bear in mind that they were written at a time when there was no reason to lie. Now, that should weigh heavily on you when you are either hearing me recite these contemporaneous documents, or when you yourself in your deliberations are looking at them. At this time these conspirators, when they wrote them, had no reason to lie. Do they have a reason to cover up now?

Now, even though the agreement wasn't written down—and you must find the agreement from a course of conduct between the parties—we do have two witnesses who admitted flat-out to an agreement.

• • • • •

[13,853] Mr. FRICANO. • • •

The Graham Morgan memorandum that is now famous, which was written in February of 1962—and you heard me go around the horn with witnesses on this one—whether or not that authorized them to engage in these pricing discussions. And I thing to a man—every one of them says, "No. But it lays out the policy under which we can engage in these pricing discussions."

Well, you folks have read that document. It has been sent out to you several times. I submit to you that was the authority and the policy underlying the authority.

Number one: It doesn't say one thing about the Robinson-Patman Act. Not one single solitary thing.

Number two: In that Graham Morgan says:

> That in order to get the information from them you must also give the information. And if you don't, it may result in consequences unfavorable to the company. To wit, if there is no exchange between you on a continuing basis, there will be market erosion and price instability. Profits will go down. Conditions unfavorable to the company.

Specifically what he was referring to—Implicitly, I mean.

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[13,870] Mr. FRICANO. • • •

Consider this, if you will. We've got 93 boxes here, most of it air. Most of it is filing folders, if you remember that little demonstration we put on, but you have 93 boxes there, and it shows about 47,000—they call them price reductions, but they are just approvals of data that was picked up in the field to enable United States Gypsum to make a decision as to whether or not it is going to meet a price.

Now, folks, everybody signed off on those. There is enough evidence of alleged good faith there that would satisfy anyone. Why was it necessary, then, to take that extra step and call the competitor? Why? They had the machinery; they had the documents, they had the manpower; they had everything in the world necessary to build any defense they wanted of good faith under the Robinson-Patman Act, and the documents, part of them, are all right in this room, right now.

I submit to you, on this basis, that again pierces the phony arguments, the phony arguments, the phony defenses, which you people have heard. When you get the salesmen signing off, you get the district managers signing off, you get the regional managers signing off—that should be enough and is enough. Why did they go the step further? Clearly, to make sure, as the situation is, there would not be price [13,871] instability; pure and simple.

Eric Fellinger, one of the last witnesses that appeared on behalf of Georgia-Pacific—and he was a distribution center manager on Long Island—now, he told us how he cut prices every day. He said that it wasn't necessary—Mr. Dennison, that is his superior, the Vice President of Georgia-Pacific Distribution Division, said it wasn't necessary to talk to competitors about prices, and Mr. Fellinger admitted—he conceded this. This is something you want to bear in mind.

Fellinger said, "We didn't just meet competition, we beat competition. When we saw one five off, we would give more."

Now, if you believe Mr. Fellinger, if you believe that, then he is violating the Robinson-Patman Act. That is discrimination. Where is his good faith? He was not meeting competition, he was beating competition, and, as he testified, in order to get the business.

Mr. MELLOTT. If the Court please, I object to that statement as an incorrect statement of the law.

The COURT. Overruled.

The jury will take the law from me. You are entitled to give consideration to any statement of law given by the attorney in his closing address, but, in my [13,872] final charge, I will tell you what the law is.

Mr. FRICANO. Thank you, Your Honor.

Now, in that connection, he was beating the price. You have heard Mr. Mellott question witnesses, time and time again, trying to bring out from them the fact that Georgia-Pacific didn't want to discriminate.

How can you reconcile this, on the one hand, his own witness—we didn't call him; his own witness said they were beating prices, not meeting prices.

That is completely inconsistent. That is more smoke screen. That shows the sham nature of this whole Robinson-Patman Act defense that has been put before you.

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[13,878] • • •

I submit to you, ladies and gentlemen of the jury, that Mr. Kroth told the absolute truth. He had no motive to lie. None whatsoever. He came on that witness stand and told it like it was. Mr. Colon Brown did not.

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[13,879] • • •

And Simpson testified that there wasn't a meeting that didn't go by that he didn't exchange competitive pricing [13,880] information with all of these people, including Watt. And he testified that they continued this exchange of pricing information with Watt right up until the time of 1969 or 1970. That is uncontroverted except for Watt's testimony.

Watt said, no, he did not, that he stopped in 1967, and that his subordinates stopped in 1968. But that doesn't hold water either.

Why doesn't that hold water? Now follow me if you will.

Galvin and Baldwin took the stand in this case on behalf of United States Gypsum. Baldwin, who had Gimlin's job after Evans had left, Baldwin testified that he stopped verifying—as he described the term, described the exchange—during the first half of 1968, late spring. And, that he made a recommendation to Watt at that time that they stop. And, the reason that was given was that the competitive prices coming into headquarters

were in such great numbers that it was reasonable to believe almost anything from the field.

Now, why did he testify that he stopped in 1968? Well, he testified to this in order to support Watt's testimony. Now you can say, "Well, how are you going to prove that?" Well, let's hear what he first testified to before the Grand Jury.

[13,881] When he said he stopped in late Spring, 1968, I confronted him with his Grand Jury testimony, and, in his Grand Jury testimony he testified that the frequency of competitor contacts didn't change during the time that he was in marketing policy.

Now, he was in marketing policy from September, 1967, to October, 1968. Now, he said that testimony wasn't correct. He said it wasn't correct because since the time he testified before the Grand Jury, he had had a chance to review some documents that straightened him out, and you know what those documents were that straightened him out—monthly reports.

Now, how can a monthly report establish in his mind that, in point of fact, it wasn't October, 1968, when he left the job, that he stopped, but, in point of fact, it was the spring of 1968? That is sheer nonsense. He changed his testimony to give additional support to Mr. Watt's testimony, because we are getting closer and closer to that statutory period, ladies and gentlemen, and Mr. Galvin did the same thing for Mr. Watt.

He came in and testified the last call he made or received was in 1968 or before that time. However, we confronted him with his Grand Jury testimony, when he made that testimony, and he testified that he didn't recall when he made his last call, just that he received a letter in [13,882] February, 1969, telling him to stop, and has had none since. That is the letter from Watt to all those people saying that, "Now we have the Container decision, you must stop."

Now, Mr. Watt says that that wasn't meant for the gypsum people, that wasn't—that letter doesn't apply to gypsum wallboard, he says, "because we had already stopped in 1968." But Mr. Galvin, before the Grand Jury, construed that letter to tell him to stop, and, before the Grand Jury, he testified that, up until that time, he was still free to exchange pricing information.

I submit to you that Mr. Galvin testified falsely in order to protect Mr. Watt, whose testimony was that "I stopped and everybody stopped before December 28, 1968."

I submit to you, ladies and gentlemen, that that doesn't hold water. It does not hold water. It is manufactured evidence for this trial, pure sham, pure cover-up.

Review with me for a moment the evidence that proves again that Watt was still engaging in price checking activities after December 28, 1968.

Remember, he said he claimed he stopped personally in '67 and authorized it stopped in the summer of '68.

Now, according to Duffy, Watt had responsibility, along with Galvin, Evans, Gimlin, Baldwin, and Morgan, for exchanging prices with competitors.

[13,883] Now, listen to this. From 1960 through 1973, Duffy the president, says that Watt had the authority, from 1960 through 1973. That testimony is unchallenged in this record, and I would like to read that to you.

Page 12,544, please. Will you get that—12,544?

> Question. Now, sir, to your knowledge, do you know who else within the corporation, if any, were exchanging prices and terms with competitors for the period from 1960 through 1973?
>
> Answer. Well, those responsibilities were held in our merchandising and pricing and policy group at that time. There were changes in personnel during that period. And I don't——

That period is 1960 through 1973.

> And I don't believe I could tell you everyone who had the authority to verify prices, but I do know some of them from time to time.
>
> Question. Well, can you count the ones that you do remember, sir?
>
> Answer. Yes. Mr. Galvin, Mr. Evans, Mr. Gimlin, Mr. Baldwin, Mr. Watt.

And Watt was there throughout the entire time period.

You will see—you will see, when I get to the credit end of this case, where those credit terms that were [13,884] fixed on March 1, 1966, continued right straight through in 1973; that we have documentary evidence of exchanges of competitive information by United States Gypsum as late as 1970 and as late as 1971; the contemporaneous documents, ladies and gentlemen of the jury—those documents that were written at a time when there was no reason to hide, no reason to cover up.

Duffy said it. He wasn't challenged on cross examination. He was not challenged. That testimony, from '60 through '73, is unchallenged in this record.

Following through with that, as in substantiation of that testimony, further substantiation, Simpson testified that he continued with Watt, up until the time he left the association, or some time in 1969 or 1970.

Going further, Van Cleve, whom I have alluded to already, who was the general sales manager for Texas Gypsum, and he worked for Ted Armstrong, Sr., said he overheard Armstrong talking to Watt on various occasions, relating to the pricing, and, as late as 1972, Armstrong was still doing it. That is unchallenged. That is '72.

A. L. Meyer, of Georgia-Pacific, said that one of the persons he exchanged competitive pricing information with was Watt, and he said that he didn't stop prior to the time that he left Georgia-Pacific, which was in May—excuse me—June or July of 1969.

[13,885] In that connection, to test the credibility of Mr. Watt in this regard, Mr. Gimlin said—and this is Mr. Watt's right-hand man, back there in 1965, when everything was happening—Mr. Gimlin said that he, from time to time, did exchange prices at Gypsum Association meetings.

Now, Watt was with him at those meetings. If you will look at the minutes, you will see, whenever Watt was there, Gimlin was there, and vice versa. Yet, Watt says there was never any exchange at the Gypsum Association meetings.

Simpson says, though, he did exchange with Watt.

Who are you going to believe? Are you going to believe the contemporaneous documents? Are you going to believe the testimony of Duffy? The testimony of Simpson? The testimony of Meyer? The testimony of Van Cleve? Or the trumped-up testimony of Mr. Watt, Mr. Baldwin, and Mr. Galvin?

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[13,899] • • •

The Court. Gentlemen, you have requested a further clarification of my ruling on your points for charge.

We will assemble for that purpose at eight o'clock tomorrow morning, at which time, I will give you further clarification as to my ruling on points.

I had indicated to you may file written objections to what I said I was going to charge, or make additional requests. I had said that that could be done by Wednesday morning. However, since you are all so greatly concerned as to how you will close to the Jury, that will have to be done by eight o'clock tomorrow morning, so I can pass on those, too.

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[13,912] Mr. FRICANO. • • •

You remember the go-around I had with Gimlin both on direct, re-direct and cross-examination about how they anticipated that their market share, USG's, would drop 7.5 percent if they put this plan into effect? But if it was successful, they would stand to make 10.6 million dollars. If they continued going the way they were, they would lose approximately eight million dollars. And Gimlin said if this plan were unsuccessful, USG stood to lose 18 million dollars.

And Gimlin also said, "If our competition did not go along with this, if they did not go along with it, that's exactly what would happen."

What would you do in a case like that? You got your company riding on a line. You got your reputation riding on a line.

Remember Mr. Watt said once that he wanted to redeem himself in the eyes of the industry and go out and make a name for himself? Supposed the thing had failed? What would this corporation have done with respect to Watt-Morgan? Think about it.

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[13,917] Mr. FRICANO. • • •

Now, follow this one: As soon as the Board of Directors announces or it is presented to the Board of Directors, Mr. Watt travels immediately to New York City. Now I ask him, did you meet with Moran or Pecaro, of Flintkote. He said, "No, I only saw my own people."

Then what does he do? Does he go to Chicago? No, he goes to Tampa, the headquarters of Celotex. Flintkote is located in New York. Celotex is located in Tampa. Immediately after that meeting. Now, he said, when he went to Tampa, he talked to Jim Walter, but it was on mineral wool. Mineral wool, Mr.

Bartlit spent all that time with mineral wool and that wasn't to entertain you. That was to set up that story. He had a contemporaneous document prior to the time of the November 17 announcement in Watt's own handwriting that he talked to Moran, of Flintkote, Walter of Celotex, Fredericks of Georgia Pacific with respect to his assignment on the Special Task Force, and one of those assignments was credit.

I submit to you at these times he also told them of United States Gypsum's plans.

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[13,918] • • •

Back to Chicago goes Morgan. Then what happens on November 15, two days before the announcement of the price increase? On November 15, conveniently, I guess, Mr. Brown and Mr. Pecaro of Flintkote are in Chicago at a Portland Cement Manufacturers meeting. November 15, two days before the increase.

Now Mr. Brown has already conceded on a prior occasion when he was in Chicago to attend a Portland Cement Manufacturers meeting, he met with Mr. Morgan. I submit to you ladies and gentlemen of the Jury, Mr. Brown and Mr. Morgan met on November 15, and the plan which ultimately evolved was that National Gypsum's plan of action—you have seen them, the three documents—came into full fruition. That matter [13,919] was aired, was discussed. These men had too much standing on the line not to nail everything down; their jobs, their reputations, the profits of their companies.

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[13,934] • • •

Where did Miller get that information? How was Miller then at that time on November 17, why was he requiring the field to send information in so that he could prepare a list?

And it is clear, ladies and gentlemen, from subsequent documents, GX 623, GX 632, GX 633, GX 642 that that November 17, 1965 request by Don Miller related to the December 15, 1965 price increase.

How did he know? Ponte Vedra, October 15, 1965. He was there and some of his bosses, Marvin Greenwood.

Now, on one of those documents, Government Exhibit 632, Miller states—it is a Miller document:

At the request of management we inquired as per attached Bulletin No. 30 re commitments.

There was never any reason for a district to assume we would allow price protection or offer price protection unless our district personnel or management had made a commitment.

See attached bulletin and outline of program re price change in December.

Please return my files attached.

[13,935] We don't have them. There was nothing attached to that memorandum. The only explanation that I can give you for not having thos plans—which I submit to you would have been extremely revealing—is that in 1969 Don Miller destroyed boxes and boxes of correspondence. You draw your own conclusion.

Mr. McSweeney. I object to that in light of what the Court has said he would instruct on.

Mr. Fricano. I believe the Court instructed that we could only argue the point to show that there are certain documents missing, and that's exactly what I said.

The Court. Objection will be overruled.

Mr. Fricano. Other documents—And, look, the reason why I am skipping over this stuff and just giving the numbers, is that they are here.

Other Celotex documents clearly show the—they established a price protection list. Government Exhibits 627, 629, 631, and 633.

Now, Kaiser and Flintkote, named co-conspirators, also adopted job price protection lists at the same time period, and that is shown in Government Exhibits 635 and 636 by Kaiser. And, Government Exhibits 637 and 639 for Flintkote.

• • • • •

[13,944] • • •

Now, you saw charts on top of charts in this room about one-half-inch wallboard. You heard Dr. Cyert testify that one-half-inch wallboard was the critical item.

Why didn't he look at the transaction prices in the high-priced items, which the single-plant producers didn't have?

I will tell you why. The lawyers didn't give it to him. If Dr. Cyert had seen the transaction raises on the high-priced

items, and those items were—when I say "high-priced items," which the single-plant producers didn't manufacture or had to buy from a multi-plant producer—if they had made that analysis, you wouldn't have seen transaction prices bobbling all over the place. Not on your tintype. You would have seen high, uniform prices, and then what would Dr. Cyert have to say?

• • • • •

[13,957] Mr. Fricano. • • •

In October of 1968, you have our typical meeting of the Gypsum Association. It comes at a convenient time, ladies and gentlemen, but, then, I guess that is another coincidence like that meeting out in Portland between Mr. Gimlin and Mr. Brown. We have a meeting, and the full cast of characters are there, Watt, Atwell, Brown, Green, Costa, McCaskill, White. On November 6th and 7th after this meeting we have telephone calls between Hunt of Georgia-Pacific and Morgan of United States Gypsum. These are in evidence. We have designated them. You may see them, yourself.

Hunt's desk calendar on November 6th states,

"Call G. Morgan," and, under that are the letters "SEC," which I take to be secretary, but it is your judgement. That is on November 6.

On November 7th, and I quote:

Call Morgan—close.

Now, when I read those into the record during the course of this trial, when I got to the one on November 7th, "Call Morgan—close," and I was arguing, at that pont, that that was Graham Morgan. Mr. Mellott popped up and said, "Oh, come on, now, there are a lot of Morgan's in business." [13,958] Well, I think that just about typifies the type of defense which these counsel have put before you. When an attorney can stand up in this courtroom, when I read a note of November 7, 1968, "Call Morgan—close," and say there are a lot of Morgans in business, well, you just crank that into your computers when you start evaluating their evidence, particularly those charts and graphs.

• • • • •

[13,964] • • •

Now, the Defendants have admitted—they have conceded that their firms were conducting exchanges of information with respect to extended credit terms throughout the period from 1960 through at least 1972, with respect to Celotex, and there is other evidence to show that, with respect to United States Gypsum, notwithstanding the Watt letter of February, 1969, saying, "Don't check prices or credit terms," that, as late as 1971, there is a document in the files of Celotex which shows a exchange of information with respect to extended terms with United States Gypsum.

There is a document in the files of Johns-Manville Corporation, which was prepared in 1970—I believe it was either '70 or '71, but I will point up the precise date to you in a moment—which establishes that, as late as then, Johns-Manville is studying the credit situation for its own business purposes; contacted National Gypsum, United States Gypsum, and the other Defendants, in order to ascertain what the situation was with respect to extended terms.

Now, I am going to quote from that document. I am telling you now it is there, and you will hear it, and [13,965] this is a document which you have identified, and the document which we are sending out to you. I offer it to you for your own examination.

• • • • •

[13,967] Then I showed him National's own Exhibit 417–A, that dealt with the September 1, 1969, price increase, and pointed out to him, in the lower right-hand corner, after Jack Hayes had approved—there are those words again—plan of action, dated June 11, 1969, after Hayes had approved, there is handwriting in the lower right-hand corner, "Not approved by CB. Note attached."

Now, what did Mr. Brown say in response to that? He said, "Well, that is not my handwriting, for one thing, and, for another thing, it doesn't necessarily mean I disapproved."

Now, what could be clearer? "Not approved by CB. Note attached."

Now, this is in keeping with the same kind of insulation that the witnesses here have tried to show to Watt and to Brown and to Nicely. They don't want to be shown to have anything to do with prices.

Now, Mr. Brown lied.

• • • • •

[13,975] Mr. FRUCANO: • • •

I submit to you ladies and gentlemen that that Special Marketing Task Force was a dodge to allow Mr. Watt to travel around the country to Tampa, and to New York, and discuss these credits and pricing matters with his competitors.

I think the best illustration of that is the fact that Mr. Watt specifically called for a meeting, a special meeting of the Board of Directors of the Gypsum Association for January 27, 1966. The day before that special meeting U.S.G. announced the new terms and conditions of sale in the industry, 2% 20th prox, net 2nd 10th.

I submit to you, ladies and gentlemen, that that credit change was also taken up at that meeting.

Now Mr. Abnee, the Executive Vice-President or the Executive Secretary of the Association, testified here that credit was not discussed at that meeting. But I confronted him with his testimony before the Grand Jury, and before the Grand Jury his recollection was that it was discussed.

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• • • • •

[13,994] • • •

The J–M document that I referred to you is J–M 1015, and it has the information with respect to the continuing source of credit checks in 1970. It is found at page 6, I believe. First of all, it sets out the programs which National Gypsum has and which Celotex has and it states right here National Gypsum, National has one large account to whom they extend most concessions generally known in the market place, including long-term financing.

Down here, the Celotex Corporation, the Celotex Credit Department reports that the bulk of their sales were previously done on a legal oriented job basis with a firm policy and so forth. Celotex Los Angeles Manager reports—this is 1970—this is the time when United States Gypsum, National Gypsum, and the others are not supposed to be discussing anything further—here is the contemporaneous document and the front page shows it was prepared prior to [13,995] April, 1970, that shows a continuing checking and exchange on extended credit terms

deeply into the conspiratorial period. The contemporaneous documents do not lie. People do.

• • • • •

[13,996] Mr. FRICANO, • • •

I want to leave you with this thought: The total sales by the Defendants and co-conspirators during this conspiratorial period was 4.8 billion dollars.

Now, think about that when you are deliberating. Are you going to send the Watts and the Nicelys and the Browns back with a clean bill, to continue this? 4.8 billion dollars? A 13-year period.

I submit to you, ladies and gentlemen of the jury, when you deliberate with respect to this matter, you consider the evidence that you have heard. Consider what they have done and what they can continue to do. And, when you do [13,997] that, I think the only conclusion, the only conclusion that you can reach, is that these Defendants are guilty.

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DISCUSSION

[14,001] [Court reconvened at 8:00 a.m. o'clock. Jury was not present.]

Mr. MCSWEENEY. Your Honor, we have the filing here pursuant to Your Honor's instructions to file them by this morning.

The COURT. All right, May I have them?

Mr. MCSWEENEY. We are filing objections to the Government's request to charge and filing supplemental requests to charge by Defendants. There are two——

The COURT. The supplemental requests for charge are out of date and I won't take them.

Mr. MCSWEENEY. May we lodge them with the clerk?

The COURT. You may lodge them.

I have given a date for points for charge. The time has passed and I am not taking them.

Do you have more, too?

Mr. MELLOTT. Yes.

The COURT. I am not taking them.

Mr. DELONE. So it is clear, the supplemental points are the efforts to meet Your Honor's comments about our earlier points having included evidentiary detail. We tried to strip that out in compliance with Your [14,002] Honor's——

The COURT. I am going to strip it out. Don't worry about it.

Mr. DELONE. I wanted to explain that they are not new. It is an attempt to comply.

The COURT. I have had a lot of things filed here that are not very new.

Georgia-Pacific request No. 1 for additional final jury instructions is denied.

National Gypsum's request for supplemental jury instructions No. 1 is denied.

Defendant Watt's supplemental final instructions regarding retroactivity of intervening change in the law affecting verification is denied.

Defendant Watt's supplemental final instructions regarding verification of the Robinson-Patman Act will be charged in substance.

I am eliminating therefrom the provisions or the statement, "I instruct you that each defendant was required by Section 2 of the Robinson-Patman Act not to lower its terms or conditions of sale."

I am not going to use that kind of language.

Also, I am not going to say each defendant could reasonably conclude that the antitrust laws did require them to know of have reason to know a competing supplier had [14,003] reduced its price.

Aside from that, I will give the charge in substance.

As to the original points for charge, these are Defendants' requests 1 through 3, will be given in substance.

Four and 5 are denied as stated.

Request 6 will be given in substance.

Now since people have a lot of difficulty understanding what I mean by that, when I say a charge will be given in substance, what I mean is that I am going to charge as requested, but in accordance with Rule 30, I am not going to use the language proposed.

Now that is what I mean by charged in substance, and I hope I will not have to come back again and repeat that again.

I read from Wright's Federal Practice and Procedure, "The Court is not required to give requested instructions in the exact language requested, even if they correctly state the law. Usually it is preferable for the Court to use its own language in framing instructions."

That is what I mean and that is what I meant before when I said it.

Counts 7 and 8 are denied as stated. I do intend to charge as requested in request 7 as to the introductory paragraph.

[14,004] Paragraph 1st and paragraph 2nd I do not intend to charge.

Paragraph 3rd I do intend to charge in substance.

Paragraph 4, paragraph 5 and paragraph 6 I do not intend to charge as follows with respect to the individual defendants:

> You may not hold them responsible or accountable for the actions of any subordinate or co-employee unless you are first persuaded beyond a reasonable doubt that the individual defendant adopted or authorized such action and understood them to be pursuant to a common conspiracy as stated.

I stated I am going to make a charge as to the individual defendants as to what must be proved as to them, and I think I outlined that in considerable detail when I gave my normal—when I gave my original statement as to—my original outline as to how I was going to charge.

[14,005] The COURT. The last paragraph of seven, I intend to charge in substance.

As to request 8, I intend to charge in substance with the exception that I do not intend to charge the next to the last paragraph thereof, which says:

> Unless each person understands from something said or done by others that he is committed to the scheme and committed to each other pursuant to the scheme, there can be no conspiracy, and thus, no violation of the Sherman Act, and it is not only necessary that each person understand his common commitment to the scheme, by something said or done, he must communicate his commitment to the others, and he must believe and understand that they are all bound together and committed to an agreed upon scheme.

I don't think that's an accurate statement of the law, and I am not going to so charge.

Request 10 and 11 will be given in substance.

Request 12 is denied as stated.

Request 13, 14 and 15 will be given in substance.

As to request 16, I will charge—I will charge that in substance, except I do not intend to say the fact that competitors have decided to follow the prices of another manufacturer does not establish a price fixing conspiracy. I think that's too broad a statement. I don't think it is an accurate statement of the law.

[14,006] I intend to charge, of course, that everybody must have joined the conspiracy, and I intend, and I don't understand the statement in your motion that I didn't tell you what I meant by joinder of the conspiracy. I certainly did, and I intend to do it again in the same fashion, that each must define, there must be proof aliunde as to each conspirator.

Now, your statement that I didn't tell you what I meant by it, so anybody that doesn't understand the term "aliunde," if they will so indicate, why, I will attempt to explain that to you.

I thought that did explain adequately what I meant, but I note that in the motion that you filed, somebody, whoever drew that motion, doesn't understand the term.

I am going to get Black's Law Dictionary which provides and says this: "Evidence aliunde is evidence from outside, from another source. In certain cases, a written instrument may be explained by evidence aliunde, that is, by evidence drawn from sources exterior to the instrument itself; the testimony of a witness to conversations, admissions, or preliminary negotiations."

Now, you can find that on page 97 of Black's Law Dictionary. It gives further rules. A verdict may not be impeached by evidence of the jurors.

There are other uses of the term, "aliunde," but I [14,007] think—I thought I had explained that originally, and I am perfectly willing to explain in greater length to any counsel, any counsel here who doesn't understand the term.

Request 17 will be given in substance.

Request 18 is denied. It has innuendo, inference or rather implication which I think is far broader than a proper instrument of the law, and I am not going to give it.

I will charge that merely having business transactions, buying and selling, business transactions between partners is not

a violation of the law. And, of course, communications relating thereto are not a violation of the law, but a charge.

Various communications that go hand in hand with such business relationships are entirely lawful and cannot be considered by you as just an incorrect statement of the law, and I have no intention of making it, of giving it.

Request 19 is denied, denied as stated. I will, as I indicated previously, charge on opportunity evidence, but I will not use the extreme type of language requested in 19.

Request 20 is denied as stated. I will tell the Jury what I believe the purpose of the Sherman Act to be. I don't believe it is the purpose of the Sherman Act to authorize dissemination of information which tends to stabilize prices, which is the implication of the request.

[14,008] If that were the purpose of the Sherman Act, Mr. Sherman would not have needed to propose it.

Request 21 will be given in substance. The first two paragraphs will be given in substance. The last paragraph, which defines it as a century-old concept and involving common sense, I am not going to go into that kind of thing.

I will charge, though, as, in substance, is set forth in paragraphs 1 and 2 of the request.

Request 22 through—22 will be given in substance except this: I do not intend to say there is a great deal of evidence relating to activities before December 27, 1968 but you must clearly understand that you cannot convict the defendants for any such activities.

That is clearly a misstatement of the law. If those statements were the formation of a conspiracy which continued into the statutory period, it can be so considered, so I am not going to say that, and, of course, these requests, 21 through 25 are practically repetitious. It looks as if five different lawyers wrote them and you decided to put them all together and give them to me.

I will charge in substance as requested. I am not going to charge the last paragraph: The prosecution must fail if it relies on circumstantial evidence of the results of prior conduct and does not affirmatively prove beyond a [14,009] reasonable doubt that the alleged conspiracy existed in the statutory period.

I, of course, expect to charge that there must be proof of the alleged conspiracy continued under the statutory period and,

as I stated previously, I intend to state that there must be an act proved in Western Pennsylvania within the statutory period, and there must be acts done in furtherance of the conspiracy, but the reverse English put into that, that phrase, circumstantial evidence, will not be given.

[14,010] The Court. Twenty-three will be given in substance insofar as provides that the mere circulation of price lists and sales of gypsum board is not sufficient to support an inference of conspiracy, since these are normal business activities. But I do not intend to charge that if a price was fixed prior to the conspiracy, and there were sales at the prices fixed by the conspiracy within the statutory period, that it is not a violation. That isn't a proper statement of the law in my opinion.

Also, I will charge on reasonable doubt, and I will charge in accordance with the normal Third Circuit provisions concerning that, which is not the same as the language used in Request 23.

I recognize that many of you gentlemen aren't from this Circuit, but, of course, we have to charge in accordance with our Circuit rules and our Circuit opinions.

Resuest 24 will be given in substance.

Request 25 concerning withdrawal, I will charge in substance, as to what is meant by abandonment of the conspiracy, what is meant by withdrawal.

I said this before—I will repeat it. That for withdrawal there must be an indication, there must be evidence that a person communicated to co-conspirators that he was no longer a part of any conspiracy, that he was withdrawing therefrom, or he must have stated it to law [14,011] officers.

Now, something along that line will be given, and if there is any question—does anybody have any questions? Do you want me to give a more definite statement as to what I am going to give as to that at this time?

Mr. McSweeney. Your Honor, may I inquire that you would give the part which says "Resumption of competitive behavior," such as intensified price cutting, or . . .

The Court. No, I will not give that. I think that's an improper statement of the law. I am not going to say that.

Competitive behavior may or may not be inconsistent with a conspiracy to fix prices, and it is just as arguable that when

prices are low there is a conspiracy to try to get them up and try to get some profits, as there is the other way.

And, furthermore, there is a logical argument here that there are people that were not in the club—as Mr. Fricano put it—not in the conspiracy that caused intensified competition.

So I am not going to charge that. That's for the jury to determine.

Mr. MELLOTT. Do I understand that Your Honor is going to charge that there has to be direct [14,012] evidence of withdrawal?

The COURT. No, I didn't say that at all.

Mr. MELLOTT. I mean the point that we are talking about would indicate evidence from which it seems to me the inference would be drawn or withdrawal.

The COURT. You can argue that to the jury, but I am not going to tell the jury that merely the fact that somebody was in competition shows withdrawal from a conspiracy. I don't think that's good law.

Mr. MELLOTT. I just want to be sure that you are going to say there had to be direct evidence of withdrawal.

The COURT. There are numerous points here that you gentlemen have asked for direct evidence. I am not going to charge that in any instance that there must be direct evidence. There can always be evidence by conduct from which you can imply something.

Request 26 is denied. I certainly do not intend to instruct the jury that verification is legal and may not be a basis in whole and part for finding of guilt. It depends on the effect of the verification, as I previously indicated, whether the verification was a good faith effort to comply with the Robinson-Patman Act, or whether the verification was a method of stabilizing, fixing, and [14,013] maintaining or raising prices.

Request 27 is denied as stated. I will charge, as I have previously indicated, as to the Robinson-Patman Act, as to the verification provision, as a part of one method by which a manufacturer or any other person in business may attempt to comply in good faith with the Act. That will be charged.

Request 28 is denied as stated. The Robinson-Patman does not require the seller to investigate or verify. It merely requires

that his actions be in good faith, and that can be done by various methods.

And I certainly do not intend to state that verification cannot constitute a violation of the Sherman Act. It certainly can.

Request 29 is denied as stated. I will charge as to reasonable doubt and the burden of proof which apply to verification just as they apply to other elements.

Request 30 is denied as stated. I do not intend to charge on verification prior to December 27, 1968 may not be the basis of finding of guilt. It may not be the only basis. But if there was proof that the acts continued within the statutory period, then such evidence can be considered in connection with the formation of the conspiracy or its design, scheme, motive, et cetera.

Request 31 will be given in substance.

[14,014] Request 32 is denied as stated.

Request 33 is denied as stated.

Request 34 will be given in substance as to the first three paragraphs, down to the point where it states a mere agreement on materials handling, for example, and agreement to eliminate pallets, even if the effect of this was to increase the profits of the defendants furnishes no basis to convict the defendants in this case.

You may not even consider such evidence unless you find that the agreement concerning material handling went beyond that, beyond materials handling, and had the further purpose and necessity of fixing the price on gypsum board. I do intend to charge—as I had previously indicated—that the discussion and the entire materials handling procedure cannot be considered a violation unless there is proof of an agreement to do so, and there is also proof that the effect thereof was to raise, fix, maintain, and stabilize prices. But the language that's used is not the language I am going to use.

Request 35. Of course, a correct statement of the law, whether it is necessary to give a charge like that, I have my doubts.

Mr. KECK. Your Honor, might I comment that this has direct application to at least two things Mr. Fricano mentioned yesterday, Mr. Huckleberry and [14,015] Republic.

The COURT. I intend to charge, of course, on predatory practices and what effect should be given to them. I am thinking

of the size or power of the competitors. I don't know that there is any basis for a charge like that. After you have heard the charge in its entirety, if somebody wishes to renew a request for 35, I will consider that at that time.

Request 36 will be given in substance.

Request 37 is a correct statement of the law. And, if after you have heard the charge in full you feel that you wish to renew a request for 37—since I don't use that precise language—I will consider doing it at that time.

Request 38 I will charge in substance.

Request 39 I will charge the first paragraph in substance.

The second paragraph I am not going to give.

[14,016] The COURT. Fifty-one, or the last paragraph on page 51 I will give in substance.

Request 40 will be given in substance.

Request 41 will be given in substance.

Request 42 I will give in—I will give a charge as to trade association activities as a part of the material handling charge and as a part of the opportunity charge. The contents set forth there will be set forth in substance in those matters.

Request 43 is merely a repetition of what is set forth in request 42, using different language.

Request 44, the first two paragraphs will be given in substance.

The last paragraph is denied as stated.

As to request 46, the first paragraph will be given in substance. The second paragraph I do not intend to give. I intend to give a charge on that subject which I think will be adequate as I have described it to you.

Mr. DELONE. Excuse me, sir. Were you talking then about 46?

The COURT. Yes.

Mr. DELONE. I think Your Honor inadvertently passed over 45.

The COURT. It could be.

Mr. DELONE. I believe the other day you indicated you were going to give 45.

[14,017] The COURT. Yes, 45 will be given in substance.

Forty-six, the first paragraph will be given. The second paragraph again seems to me to be a re-chewing of the things that have been discussed before.

The last two paragraphs will be given in substance.

Request 47 will be given in substance.

Request 48 will also be given in substance.

I am doubtful that I should give a charge saying that persons, including corporations, stand equal before the law as they are to be dealt with as equals in a court of justice. It seems to me that unduly points up some of the defendants are corporations, which might have an adverse effect on some jurors.

However, since it has been requested, I will do it.

Request 49 will be given in substance.

Request 50 will be denied.

Request 51 will be given in substance.

Request 52 will be given. The first paragraph will be given in substance.

The remainder is denied as stated.

Request 53 is denied.

[14,018] Request 54 is denied as stated.

Request 53 is also denied as stated.

Request 55 will be given in substance.

Request 56 will be given in substance.

Request 57 repeats things that have been said numerous times, but it will be given in substance.

I am not going to discuss anybody's facial gestures or things like that, but I will give a charge as to the effect of comments of counsel, argument of counsel, comments of the Court, questions by the Court and arguments to the Court.

Request 58 will be given in substance.

Request 59 will be given in substance.

Request 60 will be given in substance.

Request 61, the first two paragraphs will be given in substance.

I do not intend to give the remainder of it. The remainder of it is denied as stated. I think the position of Georgia-Pacific in relation to Bestwall would be adequately set forth otherwise.

Request 62 is denied as stated. I do not intend to make comments on evidence or inferences which should be drawn from evidence. That is counsel's responsibility.

Request 63 will be given in substance.

Request 64 will also be given in substance.

[14,019] Request 65 it appears to me has been given several times already during the course of this trial. I see no reason to repeat it. If at the close of the testimony anybody thinks it

ought to be repeated, it can be done, but I am going to charge during the course of the trial of the effects of advice of counsel previously or outside the trial, people who said they acted in accordance with advice of their counsel.

I will hopefully add something to cover that point. If not, you may request it later. I don't think it is necessary, since I will tell the jury that preliminary instructions and instructions during the trial are to be considered by them.

Request 66 will be given in substance.

Request 67 will be given in substance.

Request 68 will be given in substance.

I am refusing certain charges on the basis of, and again, I am quoting from Wright:

> "It is not error to refuse to give a requested instruction that is only partly correct in its statement of law.

I felt that some of the charges, while they were partly correct, were partly incorrect, and that is why I have stated they are denied as stated.

Now may I see those things that were just filed [14,020] this morning?

Mr. KECK. Your Honor, might I ask Your Honor's position on request 69 and 70?

The COURT. I thought I just gave it.

Mr. KECK. I am sorry. I didn't get it.

The COURT. Perhaps I didn't.

Request 69 will be given in substance. However, I do not intend to give the last statement, if they are confused about the evidence and what inferences to draw, then they must have a reason to doubt.

What they must attempt to do is to attempt to resolve the confusion.

Request 70 is denied. That is not—our Circuit has a definite formula. They have said we may not give this kind of charge, but may only give the charge as they have said it should be given and if it becomes relevant during the course of the deliberations to give the Third Circuit's version of the Allen Charge, I will give it, but it is error to give this one.

Mr. FRICANO. If it please the Court, one comment, if I may.

Your Honor stated with respect to request No. 8 the fourth paragraph does not state the law correctly. I believe that is what my notes reflect. With respect to [14,021) paragraph 40, the contrast——

The COURT. I said that paragraph 8——

Mr. FRICANO. Excuse me, Your Honor.

Request 8, 4th paragraph on page 14, I believe my notes state that is not an accurate statement.

The COURT. I said I will not charge the 4th paragraph.

Mr. FRICANO. I wanted to call Your Honor's attention to request 40, which is pretty much like 8, but Your Honor said he will charge it in substance.

The COURT. But I will not use that kind of language. My objection to that paragraph 8 is the language.

Mr. FRICANO. I understand. I wanted to call the Court's attention to the fact that paragraph 40 has similar language.

The COURT. I will not charge that language.

[14,022] Mr. MELLOTT. If the Court please, I wonder if I could ask a question about Your Honor's ruling on request No. 61. Will you be including in your charge language similar to the sentence near the bottom on page 77, that the Government must prove beyond a reasonable doubt that subsequent to April, 1965, Georgia-Pacific consciously committed itself to the conspiracy?

The COURT. Oh, of course. I am not going to charge it in that language, but I am going to charge it in substance; that there must be proof that Georgia-Pacific joined the conspiracy, and they couldn't have joined it prior to the time they were in the business.

Mr. MELLOTT. Thank you.

Mr. BARTLIT. Your Honor, I take it that somewhere in the instruction—it doesn't make any difference to me where—Your Honor will say that a defendant can't be convicted on suspicion or on conjecture.

The COURT. Oh, naturally, Mr. Bartlit. You know I am going to say that.

Mr. BARTLIT. I assumed that. I just didn't hear it, and I prefaced my remarks with my belief that it was going to be included.

The COURT. I think I have already said it in the preliminary instructions; that nobody can be convicted on suspicion.

[14,023] Mr. MELLOTT. There is one other one that I believe Your Honor may have inadvertently overlooked, unless I missed it, and that was your ruling on request No. 9.

The COURT. I am not going to give—I am going to give the first part of request No. 9. I am not going to give the part from "However, in determining if there was a knowing and a conscious intent—" that part forward, the rest of it, I am not going to give. I think that sheds more confusion than light.

The supplemental requests for charge filed by the defendants, which I have stated comes too late. It seems to me perfectly obvious that no one could think that I could possibly review those requests.

There is 21 supplemental requests, and the pages—no, there is more than that. There are 22 supplemental requests, and I am unable to count the pages at this time, but, certainly, nobody thinks that giving me these at this stage of the game would possibly enable me to rule on them in time for you to be guided in the making of your closing remarks to the Jury. That is just an impossibility.

Mr. DELONE. we didn't think that, sir, but you had, as I tried to explain the other day, you indicated there was too much evidentiary detail, and what we did attempt to do was to strip out the references to evidence, in response to Your Honor's comments the other day.

[14,024] Obviously, you couldn't on this time table rule on them now, but if they are of any help to the Court in getting rid of the evidentiary details, that's really why they were submitted.

The COURT. But, you see, you gentlemen filed one objection stating that I didn't rule on your requests. For that reason, I am denying all of your supplemental requests, because they are too late for me to possibly pass on them prior to Mr. Keck's closing, which is going to start in about 45 minutes. There is no way that I could do that.

Now, just a minute.

Mr. MELLOTT. Excuse me.

The COURT. I will use them only for the purpose of my own guidance in my final charge, but they are just too late for me to pass on them as a supplemental request for charge, as for guidance of counsel, under the rule which you gentlemen set forth.

Mr. MELLOTT. If Your Honor please, at least as far as Georgia-Pacific is concerned, we would waive the requirements of that

rule with respect to these supplemental requests. We would not intend that that would be required of Your Honor with reference to the supplemental requests.

Mr. DELONE. And I say the same for National. I have tried to say it, I guess, somewhat awkwardly.

[14,025] The COURT. I thought you said it on the morning of the 27th, prior to 10:30 in the morning, but you changed your mind by five o'clock that night, so you said specifically that morning, when I had given what I thought was a pretty broad outline, you specifically, Mr. DeLone, said that that guided you.

Maybe I can find the precise statement you made. You said you wanted a point of clarification. I intended to give it, and you said, "That enables me to understand the gists of the rulings as you have indicated," and I thought that—I took you at your word, and, lo and behold, at five o'clock that night, someone filed with my office, with you as the first signatory, the statement saying that the rulings were so confusing that you didn't understand them, so this—I don't want to be misunderstood now.

I am denying all the supplemental charges, because they are not timely. I will use them for my own guidance in the final charge.

Mr. DELONE. I want to express to you, sir, certainly, what was filed as late as it was the other day, and I am sure Your Honor is familiar with the problems of any filing in a case of this magnitude with this many lawyers in it——

The COURT. Unfortunately——

Mr. DELONE. No discourtesy to the Court [14,026] was intended, and I appreciate your taking the time here this morning to give me a clearer understanding as to those points, particularly where you had indicated before that you were going to deny, as stated, but give some of it in substance.

I now feel I understand better than I did when I looked over the transcript. I could not see it the other day, sir.

The COURT. I am not so thin-skinned that I react too badly to discourtesy. I do react badly to what appeared to me to be ambushing.

Mr. DELONE. Well, that was not—that was certainly not my intention, and I would—my concern, sir, is that if you felt there was ambushing, this might unwittingly have an adverse reaction on my clients.

I and others, I am sure, are only endeavoring to do what we think we must in this case.

The COURT. The fact that I don't like the tactics that were used by counsel in filing that thing too late for me to consider it prior to Monday morning, filing it just two minutes before my staff left on Friday afternoon, when the closing was to start Monday morning, I said before, and I say again, I am not sure that that complies with the standard of conduct which members of the Bar owe to a Court of which they are officers. However, I would certainly not allow anything like that to affect the interests of any [14,027] client.

Mr. DELONE. Thank you, sir.

The COURT. As to the objections to the Government's request for charge, I will have the week in which to consider those, since the charge isn't going to be until next Monday.

Now, is there anything else? I don't want to get something at five o'clock tonight, so if there is anything else anybody has to say, speak now or forever hold your peace.

Mr. MCSWEENEY. Well, Your Honor, on the Government's requests for charge, as I understood Your Honor to say that you would deny them as stated, but in substance the portions of that which were statements of the law, the Court would give.

The COURT. Yes.

Mr. MCSWEENEY. And I think that to the extent you can, if you would give us further clarification of that, I think that's the part that isn't clear to us.

I can tell, at least on ours, because you have given each by number, but with respect to the Government's, where they have an interweaving of law and facts, it was so hard, it is impossible, I find it, to pull out of that what is meant by—just what Your Honor is going to do with respect to those Government charges. That's my problem.

[14,028] The COURT. I have indicated that I am going to charge only in substance, which means that I am not going to comment on any of the facts which I was requested to be charged, nor am I going to comment to the Jury on what inference I think should be drawn from any of the facts.

But I am going to charge, and many of their points weren't too different from the points filed by the defendants.

For some reason or other, both sides sort of figured I needed general education in hornbook law on making charges, and you went through an introduction for me, which was very friendly

of you, and you told me about the burden of proof, and you told me about the presumption of innocence.

Now, the Government asked that I charge on direct and circumstantial evidence. That's their first request.

I am going to charge what direct evidence is.

Now, again, if any of the learned group feel that you need me to tell you what I am going to tell them direct evidence is, I will be glad to do it. It is that evidence which one sees, hears, feels, tastes, or touches, something that they get directly.

Circumstantial evidence, I will charge, is evidence of a set of circumstances from which the Jury is asked to infer other circumstances.

I am going to charge, as I told you, on the morning of the 27th, that either direct evidence or circumstantial [14,029] evidence or both are sufficient and that in some instances circumstantial evidence is of a higher caliber than direct evidence, and in others it isn't.

For example, identification evidence is direct evidence. That is not as high a quality of evidence as to reliability as some circumstantial evidence.

I intend to tell the Jury that.

As to the tables, charts and summaries, I intend to tell them, as I have indicated previously, that they have heard evidence as to alleged inaccuracies of the tables and summaries on both sides.

It is what the purpose of those tables and summaries is. It is to enable them to understand evidence which is massive in nature, such as the boxes here in the room, that they couldn't possibly analyze all those documents, and that the summaries and charts are given to help them understand it.

It is for them to determine what weight is to be given to any one of those, taking into consideration the alleged inaccuracies.

As to the credibility of the witnesses, I intend to tell them that that is for them and them alone to determine, and to give the normal definition of how they do that, and I went through this on the morning of the 27th as well—If somebody feels that they would like it again, I will be [14,030] glad to give it to you again, as to how the Jury determines, passes on credibility of the witness.

The same is true with expert testimony. I intend to tell them, circumstances, and, again, I went through this on the morning of the 27th. Now, I will be glad to go through those two again

if anybody feels that they need to hear that.

[14,031] The COURT. I am going to charge that they shouldn't concern themselves with the fact that, certainly, alleged conspirators aren't here at trial. I am going to summarize the Sherman Act—and I went through that in some detail, I think, on the morning of the 27th.

I intend to tell them the purpose of the Sherman Act, which is, as I see it, to make certain that the rate at which goods are sold is determined by competitive prices and not by agreements between the parties that enter into the sale.

I intend to tell them that our economic system is based on free enterprise and that free enterprise is based on competition; that monopoly has a bad effect, because then we have to have an immense bureaucratic control of it to make sure that fair prices are charged; and that there is no difference between a monopoly and a price agreement if prices are fixed not by competition but by agreement. If that happens, that's the death knell of the competitive system, and that's what I intend to tell the jury.

As to conspiracy, I intend to define conspiracy as an agreement to do something which the law forbids, or not to do something which the law requires. I intend to tell them that there must be proof aliunde of the conspiracy. There must be two or more members in the conspiracy.

I intend to discuss acts or declarations of [14,032] co-conspirators that must be in furtherance of the conspiracy and have been done during the existence of the conspiracy.

I intend to charge that corporations act through agents; that the agents must be duly authorized agents. And, as to individual defendants, that they are responsible for what they do themselves or that which somebody else does with their knowledge, and either ratification or concurrence.

I intend to define the charges made.

I intend to tell the jury that price fixing is, per se, irrelevant, and discuss what it means. What "per se" means. Again, I will be happy to define "per se" for you. I have Black here if somebody wishes that.

As to methods and means, I have already stated that I have divided these into categories and intend to charge on them.

I intend to charge on the Statute of Limitations, that there must be proof that the conspiracy continued into the Statute

of Limitations, that there were acts within the statutory period in furtherance thereof, and that something was done in the Western District of Pennsylvania to give this district venue before they can act.

I intend to charge, as I have previously indicated, on opportunity evidence.

I intend to charge that whether a conspiracy succeeds or does not succeed is totally irrelevant. The [14,033] question is: Was it entered into? And, of course, motives have nothing to do at all, that the evidence must be viewed as a whole, and not one part pulled from another.

I intend to charge on withdrawal from a conspiracy, as I indicated, or abandonment of a conspiracy. And I previously indicated that.

Now, those are the bases of the objections to the Government's requests for charge.

Now, does anybody want further definition of anything concerning that?

Mr. BARTLIT. Your Honor, I have one comment on Government's 3, credibility. Government 3 says that documents should be given more weight than testimony. I didn't know that was the law. That's one of the objections I filed.

The COURT. I said that I am going to charge in substance. I did not say—and I tried to make perfectly clear—that I am not going to use the specific language given in anybody's request for charge; because, whether I am right or not, I prefer my own.

Is there anything else?

[No response.]

Will the record indicate that I have given everybody, now an opportunity to ask for any further clarification of any point or any further clarification of [14,034] anything, of any part of my charge that I am going to give, and nobody has indicated either that they want official further clarification or that they are in doubt about what I am going to charge.

Of course, nobody has indicated necessarily that they agree with me merely because they say they do not. I do not expect anybody to indicate that they might agree with what I am going to charge at this stage. But, as far as you knowing how I am going to charge before we hear Mr. Keck at 9:30, I have heard no further requests.

We therefore recess until 9:30.

There are no points, as far as I know, that anybody has made, with the exception of the supplemental requests, which have not been ruled on.

[Recess taken at 8:55 a.m.]

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[14,035] USG CLOSING ARGUMENT

The COURT. Good morning, ladies and gentleman.

You may proceed, Mr. Keck.

Mr. KECK. Thank you.

It is now my privilege to discuss with you the significance of the evidence that you have so patiently listened to for so many weeks.

I would like to thank you on behalf of my client, myself, and my associates for your careful and conscientious attention over nearly four months, now, while the prosecution and defense have submitted their evidence, cross examined witnesses, and shown you great amounts of economic and other evidence relevant to the issues in this most important case.

You have our grateful appreciation for the time and attention that you have and are giving to this matter.

You will recognize that this is my first chance and my last to discuss this evidence as it relates to my client, evidence that you have seen and heard and that is in the record.

Your efforts to assemble a complicated jigsaw puzzle with many missing pieces and with no box-top illustration for a guide is about to begin. All of the pieces of [14,036] that puzzle are now in evidence, but those pieces are so numerous that you could literally spend many months simply reading each exhibit in evidence, impractical as that might seem.

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[14,086] • • •

As I understand it, His Honor will instruct you that verification is not illegal if done for the purpose of a good faith effort to avoid discrimination under that law.

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GEORGIA-PACIFIC CLOSING ARGUMENT

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[14,361] In his preliminary charges, as I am sure he will in his final charge—at least, I would expect he would in his final charge—Judge Teitelbaum explained this essential concept of conscious commitment, as follows—I am quoting:

> The law has not been violated unless the evidence shows that there was, in one way or the other, a conscious agreement between the competing companies by which each company consciously committed itself to each of the other to pursue a common course of action. In short, the law requires that individuals involved understand from something that was said or done that they were, in fact, committed to a common scheme—to the common scheme. There is no such thing as an unwitting conspirator. This element, like all elements of the crime charged, must be proven by the Government beyond a reasonable doubt.

When this very important and indispensible standard is applied to the uncontradicted facts that I have reviewed with you today, it is clear that there has been a complete and utter failure by the Government to prove that element. Certainly, it has not even approached proof of this element beyond a reasonable doubt. It is impossible that Georgia-Pacific was consciously committed [14,362] to the conspiracy charged of fixing prices but yet, by express and conscious policy, arranged for its prices for gypsum products to be determined, day-by-day individual transactions, by its branch managers in the exercise of their independent pricing authority.

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DISCUSSION

[14,385] [The following proceedings were held in Chambers, in the absence of the jury and in the presence of counsel for the government and counsel for defendant Andrew J. Watt and in the absence of counsel for all other defendants.]

Mrs. ROHM [Alternate Juror No. 1]. I am back in here, Judge.

The COURT. You sure are.

Mrs. Rohm, it has been brought to my attention—Mr. Bartlit thought it his duty to bring to my attention—as an officer of this court, he has got a duty to the court, and he told me of the occurrence between you and Mr. Watt on an elevator. I am told

that you said to Mr. Watt, "It is eleven to one. Get me on this jury."

Mrs. ROHM. I said, "I would sure like to get on this jury; I have been here so long." That is what I said.

The COURT. You know you seriously violated the oath that you took. I am going to excuse you from this jury now. I am going to ask you to wait here until the jury is back in the jury box, and then, I am going to ask you to get your coat and your things and go home.

I am instructing you that you may not discuss or talk about anything to any member of this jury, about anything whatsoever, until this case is over and the jury has returned its verdict. If you do, you will be seriously violating the law. I know you have friends on the jury. I don't want you [14,386] to call one of them.

Mrs. ROHM. I don't even have their numbers.

The COURT. Beg pardon?

Mrs. ROHM. I don't even have their phone numbers.

The COURT. All right. I don't want you to call anybody or talk to anybody or do anything. The reason I am discharging you this way is I don't want you to associate with any of the other jurors any more, until the jurors have returned a verdict in this case.

You remain here, now, and when the jury is back in the jury box, I will tell them that you have been excused, without stating why.

I have asked the prosecutor not to take any action against you. I don't intend to take any action, because I don't think you acted in bad faith, but you used very bad judgment.

Mrs. ROHM. I probably did, but, you know, I feel so bad—if you see how I feel, being here four months, and I don't have a chance.

Mr. BARTLIT. Mrs. Rohm, I, personally, feel bad, because I know you didn't mean anything, and I asked the Judge to make this point, but I want you to understand, Mr. Watt and I didn't have any alternative. My [14,387] professional obligation required me to do it.

Mrs. ROHM. Yes, but I felt bad——

The COURT. Don't you remember, in the beginning, I told you not to talk to anybody, in the beginning?

Mrs. ROHM. I guess I didn't remember discussing it.

The COURT. You not only talked to somebody, you talked to a Defendant. In fact, I told you the lawyers couldn't do anything but say good morning. Do you remember that?

Mrs. ROHM. I guess. You know, it was all so new to me when I was here in the beginning, it was all so new to me.

The COURT. You understand what I am saying now?

Mrs. ROHM. Yes.

The COURT. I don't want you, by any means, to pick up any telephone or discuss with anybody why you are not on the jury any more.

Mr. BARTLIT. And it could be very bad for Mr. Watt if you did. It could hurt him as much as it hurt anybody.

Mrs. ROHM. I am sorry if I did something—I guess I didn't feel there was anything——

[14,388] The COURT. The Defendants won't want to try it over again. It is a very expensive proposition. And the Government doesn't want to try it over again, and I don't want to try it over again, so we are doing everything we can to correct the situation.

So we will just ask you to stay here until the jury is in the box.

Tell Walter to put the jury in the box.

Then, after they are in the box, just get your coat and go.

Mrs. ROHM. All right. I don't have anything back there—yes, I do.

The COURT. Off the record.

[Discussion was held off the record.]

[14,389]

[The following proceedings were held in open court, in the presence of the jury.]

The COURT. Good morning, ladies and gentlemen.

You have noted that I have excused Alternate Juror No. 1. I would like, therefore, Alternate Juror No. 2 to move to the front seat and Alternate Juror No. 3 to move over. You will now become Alternates 1 and 2.

Now, you are Alternate No. 1, and you are Alternate No. 2.

* * * * *

GEORGIA-PACIFIC CLOSING ARGUMENT (RESUMED)

[14,396] Mr. MELLOTT. It is perfectly legal for the two companies to discuss buy-sell arrangements.

Now, Mr. Fredericks did meet—as the documents indicate—with Mr. Morgan and Mr. Watt on December 30. And these exhibits which the Government put in evidence, which Mr. Fricano hasn't referred to, completely confirmed the legitimate purpose of that meeting, and again displays the wholly unfair insinuations which Mr. Fricano makes from perfectly lawful events.

Now, finally, with reference to the meetings involving Georgia-Pacific, or alleged meetings, or telephone calls, Mr. Fricano in his closing attempted to prejudice my client's position by suggesting that my objection to the admission of the William Hunt calendar entry of November 7, 1968—which simply read, "Morgan—Close," or "Call Morgan—Close," was improper.

Now, I made that objection because that entry did not read, "G. Morgan," as had appeared on the November 6, 1968 entry, and because it had a dash following the word, "Morgan," and the name "Close," following that dash.

Now even assuming, with Mr. Fricano, that the Morgan who is otherwise unidentified in the entry was Graham Morgan, who is the Mr. Close whose name is linked with Mr. Morgan's on that entry?

The appearance of the name "Close," on that entry linked [14,397] with Mr. Morgan's with a dash, suggested to me that the entry had nothing whatever to do with Gypsum matters, since I knew an executive in another industry having nothing to do with Gypsum who was involved in that industry at the time of that entry whose name was Close.

Finally, as I expect His Honor——

Mr. FRICANO. Objection, Your Honor.

The COURT. Yes. Mr. Mellott, you can't put evidence into your closing that you knew a man by the name of Close.

Mr. MELLOTT. Your Honor——

The COURT. You can't do that, sir. I instruct the Jury to totally disregard it.

Mr. MELLOTT. In fact, the reason for my objection——

The COURT. You cannot tell the Jury something that isn't in evidence, something that is in your personal mind. And you

are, in effect, testifying to this Jury, and it is not permitted, and I instruct the Jury to totally disregard that.

Mr. MELLOTT. Well, if the Court please——

The COURT. Please don't argue with the matter. You may not. It is just not permitted for counsel, in summing up to the Jury, to tell something, anything of his personal knowledge that isn't on the record.

[14,398] Mr. MELLOTT. Well, if Your Honor please, there is evidence in the record identifying the Close as the Close to whom I was referring. U.S.G. Exhibit.

The COURT. Yes, but you said, "I know a Mr. Close," and that's what I don't permit you to say. Now, go ahead.

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CELOTEX CLOSING ARGUMENT

[14,438] Mr. MCSWEENEY. Now, Mr. Fricano also stated to you that he had a contemporaneous document—this is in his closing argument—prior to the time of United States Gypsum's November 17, price announcement, in Watt's own handwriting that he, Mr. Watt, had talked to Mr. Walter of Celotex and others with respect to his assignment on the Special Task Force and one of those assignments was credit.

Now, there is no exhibit that I know of, and I say there is none in this record, such as described by Mr. Fricano as the contemporaneous document in Watt's handwriting prior to U.S.G.'s November 17, date.

There is, however, a letter of Mr. Watt on United States Gypsum's stationery to the Gypsum Association, and it is dated December 16, 1975—1965; December 16, 1965, not November 17. And it does state that he has discussed certain aspects of the Gypsum Association Task Force with Mr. Walter and others. But among the subjects which are listed, there is no mention of credit. So it is after that date of November 17. It is GX-931. And it is not pertaining to credit. And, also, you will recall Mr. Watt's uncontradicted testimony that his conversation with Mr. Walter and others on that subject, the subject of that letter, was on the telephone; the Task Force matters talked about on the telephone, in a telephone call. Now, so much for that.

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DISCUSSION

[14.495] The COURT. Ladies and gentlemen, we are going to be in recess now until Monday, because, of course, Friday is the Fourth of July, and it is a long week-end.

I want you to remember please, and I want to remind you of what I said during the process of selecting the jury.

I have said to you that you are jurors to try this case. You were part of a panel at that time, you weren't jurors. I said that you should not discuss this case with anyone. And by "anyone," I mean anyone. You shouldn't discuss any of the testimony. You shouldn't discuss any kind of conclusions you might have with your family at home, any other people. I am sure nobody will attempt to talk to you. You shouldn't discuss it, if you happen to see me, you shouldn't discuss it with me. You shouldn't discuss it with any of the lawyers. You shouldn't discuss it with Mr. Keene. You shouldn't discuss it with any of my staff. You should just not talk about the case at all.

And I told you why—because if you express opinions it becomes a little harder to change those opinions. Pride enters in. I told you that before you were on the jury. I told you that counsel was not permitted to speak to you, that you were not permitted to [14.496] speak to any of the parties in this case about anything except to say good morning or good afternoon, nothing beyond that should you say to anyone.

Then after you were sworn I said, "Now, ladies and gentlemen, you have been sworn as jurors to try the case described. Again I caution from this time forward you must not discuss this case with anyone outside the courtroom. And when I say anybody, I mean anybody at all. When you go home tonight your family is going to want to know what you did. You tell them that you are jurors, that you are going to be here for some time, and you cannot discuss it at all."

After it is over, I told you you could discuss it. But I cautioned you to not discuss it with each other until you have heard all the evidence and the final charge of the court. Now, you would violate your sworn duty if you did that, if you violated that.

In other words, if you discussed the case with each other and reached any kind of conclusions prior to the charge of the court, you haven't heard the law that's applicable. You haven't heard the final summations of Mr. Bartlitt or Mr. Watt and Mr. Warnke for Mr. Brown and Mr. Nicely.

So, in fairness, you should keep an open mind until you have heard that, and then until you have heard [14.497] my final charge; because everybody in their closings have told you that while they argue the law to you, you must take the law from me. So you must wait until you hear the law before you reach any conclusions.

I don't mean to say that for four-and-a-half months or four months you have sat here and haven't at least reached some tentative opinions. Probably you have. But I ask you to keep your minds open, to keep them subject to change, to not reach any kind of final conclusions until you have heard the final summations and the final charge of the court on the law, so that you will be able to take the law as I give it to you and apply that law to the evidence.

And, of course, it isn't helpful if you express opinions to each other. It becomes a little more difficult to change those kinds of opinions after you have expressed it. And it is for that reason that I ask you not to do it.

And, of course, as I say again, don't read anything about the case. Don't listen to anything about the case. If you have heard any expressions of any kind of tentative thinking from your fellow jurors, kindly keep that confidential. That's your oath. You are not supposed to go out and talk about these things.

Now, we are going to be gone for several days. This is a serious case. It has taken four months to try.[14.498] Let's keep your minds open for this next 2, 3, 4 days until you have heard all the summations and all the charge of the court.

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[14.503] [In Chambers.]

The COURT. Gentlemen, what is the problem?

Mr. MELLOTT. Well, Your Honor, we requested this conference because we would like to clarify your thinking with reference—I mean as far as our understanding of your thinking, with reference to the matter that came up last Thursday when you excused Mrs. Rohm, after the hearing that was attended by Mr. Fricano and Mr. Bartlit.

When you subsequently advised the rest of us of it, I want to clarify your thinking on that—well, our understanding of your thinking, I should say, not your thinking.

And that is, as we understand it, we will wait until the jury goes out after your charge, and then we will interrogate the

alternates, or the jurors that are excused, whichever it is, to find out what the situation is with reference to the question.

The COURT. I never expressed any intention to interrogate any alternates.

Mr. FRICANO. To the contrary, you not only never expressed that intention, but you indicated you were inclined to leave the matter lie where it is.

Mr. MELLOTT. Maybe we misunderstood.

[14,504] The COURT. I did indicate an intention to have that woman who spoke on the elevator brought in and talk to her further as to what happened. I do not want to talk to the alternates.

Mr. MELLOTT. Well, we——

The COURT. The jury is deliberating. I don't want to talk to the alternates and run a risk as to one of them indicating what the thinking is.

Mr. MELLOTT. We are not suggesting that now. We are talking about after the deliberations start.

The COURT. I don't want to do that, because there is too grave a risk of one of those alternates indicating in that kind of discussion, what their thinking or the thinking of some other juror is.

Mr. MELLOTT. The problem is there has been an indication that the jury has been deliberating, Your Honor.

The COURT. No, there isn't.

Mr. MELLOTT. From what Mrs. Rohm indicated to Mr. Watt, there has been.

The COURT. What Mrs. Rohm indicated to me did not indicate that when I talked to her. I asked Mrs. Rohm what had happened. Fred was there. Mrs. Rohm said, "All I indicated to Mr. Watt was I would like to be [14,505] on the jury."

Mr. MELLOTT. Well——

The COURT. That is what she said.

Mr. BARTLIT. That is what she said. Yes, sir, I don't feel that——

The COURT. There is no indication even from Mr. Watt's statement, as I understand it, that the jury has been deliberating.

Mr. MELLOTT. Well, in the statement that is one to eleven, Your Honor——

The COURT. That doesn't mean deliberations.

Mr. MELLOTT. The only way you can tell that is if somebody has been deliberating.

The COURT. Any of the parties can do anything they want to. I won't do anything on my own.

Do you have something you want done?

Mr. MELLOTT. Yes. What we would like to have done, Your Honor, after your charge, after the jury retires, we would then interrogate the jurors who don't go out, either the alternates, including Mrs. Rohm, or in case some of them don't show up, and the two alternates don't show up, it would be with the jurors that have been excused.

In any event, we would interrogate the jurors who [14,506] have been excused, to find out if there has been any deliberations, and after that we would make a mistrial motion.

The COURT. You can do that, if you want to. I won't do it.

Mr. MELLOTT. The thing we have to be satisfied with is that that procedure would meet with Your Honor's approval.

The COURT. May I say personally I am satisfied there has been no deliberations by the jury. I'm perfectly satisfied from what I heard from Mrs. Rohm, and an analysis of what Mr. Watt said.

What I do assume is that this woman, who has indicated a concern from the beginning as to the welfare of corporations is listening to discussions and has reached an opinion that all except one of the jurors is against the defendants. Now that is what I assume. I do not have any feeling that there have been any deliberations.

Mr. MELLOTT. Well, the problem is we don't know that, and in view of what she said, it is conceivable there have been discussions.

The COURT. Do you want me to ask the whole jury? That is the alternative I am willing to do. I am willing to ask this jury, to tell them my instructions, and say to them, "Now, ladies and gentlemen, you heard what [14,507] I instructed you. Has this jury had any deliberations toward reaching a decision as to the innocence or guilt of any of these defendants?"

[14,508] Mr. FRICANO. And maybe adding to that, Your Honor, do you all have an open mind as of this moment.

The COURT. I am perfectly willing to do that.

Mr. MELLOTT. We don't want you to interrogate the whole jury.

The COURT. I will not interrogate the alternates. I think that is improper.

Mr. DELONE. Did I understand you were planning to have Mrs. Rohm back, the one alternate?

The COURT. If you want her back, I will have her back and you can interrogate her in open court. I will not interrogate her.

Mr. DELONE. Might we ask when the twelve go out, the twelve that ultimately go out to deliberate, to ask the other jurors, whoever remains, not going out with the twelve who were to decide, to ask them to stay until we have had a chance to question——

The COURT. No way.

Mr. DELONE. To——

The COURT. No way will I ask those two or three jurors any questions.

Mr. DELONE. Well, could we? If we are going to ask Mrs. Rohm some questions, perhaps we could [14,509] have them here available in the event——

The COURT. I will do that later on, if I do it, not during the course of the deliberations. I have thought about that. I am not going to do that.

Mr. MELLOTT. Well——

The COURT. I think that wouldn't be proper.

You know, I have been around a little bit. I didn't just come out of the egg. I think that would be thoroughly improper.

Mr. MELLOTT. It seems to me, Your Honor——

The COURT. Let's not kid. By talking to them, it is possible to get an insight into what the jury is thinking, and then we will get a mistrial motion by whoever thinks it is not in their favor, and I have no intention of allowing that kind of situation to arise.

Mr. WARNKE. Do I understand, Your Honor, you would be prepared after the jury has come out?

The COURT. After they have come out with a decision, not before.

Now, this is a very dangerous thing you are suggesting.

Mr. DELONE. The whole thing is [14,510] dangerous.

The COURT. But I think I could be subjected to very severe criticism for allowing an interrogation of alternate jurors, excused or not excused, during the course of the deliberations of this jury and I certainly am not going to do that.

Afterward, if you gentlemen want to move something and you want to take the risk of something like that, that is your business, but I am not going to. I don't think that is proper.

Mr. DELONE. No. The one thing I am not—and again, in the interest of clarification, insofar as Mrs. Rohm is concerned, is Your Honor saying that with reference to her, after the jury has gone out to deliberate, while we are here, now——

The COURT. No, no. After the jury verdict is in.

Mr. DELONE. Not until after the verdict?

The COURT. I don't want to interrogate anybody. I think that would be highly improper for me to interrogate anybody in this kind of a thing. I am willing to ask this jury, as I have said in open court, whether or not they have had any deliberations, just as we asked them have you read the newspapers sometimes, [14,511] or have you listened to the television sometimes, where an unfortunate story appears. I am perfectly willing to ask this jury that before they go out to deliberate.

Mr. DELONE. With all due respect, I think the Court has made clear that would be inappropriate if any questions are to be asked of the jury going to extraneous influences on them or discussions or deliberations.

The COURT. I didn't say that.

Mr. DELONE. If any questions are to be posed, aimed at that subject or investigating that subject, it should be done one-by-one in camera, according to the Third Circuit decisions.

The COURT. No, no. Judge after judge has asked the panel as a whole whether they read the morning Post Gazette. I have seen that done in the Second Circuit in New York. I have seen it done in the Third Circuit. I have seen it done in Jacksonville.

Mr. DELONE. The Hudspeth case, I think it was—it is one I cited to Your Honor, where we had problems of publicity in the beginning, the Third Circuit approved the idea of not talking to the jury as a whole, but going one-by-one.

The COURT. That is a different thing you are saying now than what you said before. They [14,512] have not disapproved the asking the jury and, in fact, they have—Judge Weis wrote an opinion which I have sitting on my desk, where he encouraged asking that kind of question.

Mr. DELONE. You mean to the panel as a whole, rather than one-by-one?

The COURT. We put them all under oath and ask them and we ask the panel as a whole.

Mr. DeLone. Yes, but the panel as a whole——

The Court. I am not going to do this, except with the request of every Defendant and the individual Defendants in writing. I am not going to do anything about that.

Mr. DeLone. Well, Your Honor had offered to speak to them as a whole and I think that would—I don't request that.

The Court. I won't do that unless that is requested.

Mr. DeLone. I won't request that, because I think that would be wrong and prejudicial.

The Court. I won't do it unless it is requested.

Mr. Mellott. Our request is that we talk to the three that are excused.

The Court: Absolutely not during [14,513] the deliberations of this jury. I will not even consider doing a thing like that.

Mr. Mellott. Let me ask this question, then: Will Your Honor indicate what your reactions would be as far as our right to file motions for mistrial, if the interrogation subsequently discloses prior deliberations?

The Court. I don't know what your rights would be. You are all attorneys and I think you have to decide yourself what your rights would be.

Mr. Mellott. What I would like to know, whether you would agree we would not waive the right to make that motion as not being timely, because we wait until we have a chance to interrogate those three witnesses or three jurors.

The Court. This is a decision you have to reach. I don't think it is my job. We have a roomful of lawyers that have probably more experience than I do in these matters and I think you have to reach your own decision. I am not going to express an opinion one way or the other. I don't know. I have never had this happen since I was admitted to the bar in 1940, and I never had this kind of thing happen.

Mr. Warnke. I think it is brand-new for all of us.

[14,514] The Court. I never had it happen and if any of you have experience, if any of you have had experience——

Mr. Fricano. Judge Marsh did in that narcotics case. After the jury deliberated, one of the jurors talked to one of the defense lawyers on the fact they beat him over the head in the jury room and Judge Marsh——

The Court. That is an entirely different question than is a premature deliberation. You can't go into what went on

when the jury properly is deliberating. That is not the problem we are confronted with here.

Whatever you men want to do, with the exception of talking to jurors first to decide what you are going to do, I am willing to go along with, but I am not willing to have a preview by talking to those jurors.

Mr. DeLone. I think we are left with no alternative but to wait until after the verdict comes in.

The Court. You have another alternative. I am willing to tell, with all your consent and the consent of the individual defendants in writing, I am willing to interrogate the panel as a whole before we start the closings.

[14,515] Mr. Warnke. I cannot request that on behalf of my client.

Mr. Fricano. I have a problem.

Assume, if Mrs. Rohm comes in, I don't like to get hypertechnical, but she may have committed a crime.

The Court. There is no question.

Mr. Fricano. Should she be advised of her constitutional rights before she testifies?

The Court. I think she should have an attorney and I think she violated the law when she talked to Mr. Watt. I am seriously considering discussing that with the United States Attorney, but that is neither here nor there.

This is a delicate situation. We have tried a case for four and a half months or for four months and I am not inclined to wander down untested paths.

Mr. DeLone. For my part, I just—my position is clear. I can't speak with any agreement. I want to say, as far as I am concerned, in light of Your Honor's unwillingness to do any interrogation at this time, except en masse, I would be opposed.

The Court. In open court.

Mr. DeLone. I would be opposed to such a move, and I believe under these circumstances I am entitled, after the verdict comes in, to raise this matter [14,516] as a ground for a mistrial, if the facts develop that warrant it. I don't know the facts until the jurors are interrogated.

The Court. I thought about this, not in relation to the alternates, but to bring Mrs. Rohm in and talk to her, but the more I thought of it, the less I liked it. I am afraid I don't know what

she is going to say and I am afraid she will indicate discussions among jurors and I think that is improperly discussed. I don't think there is anything improper about jurors discussing it, although I have told them not to. But there is something improper about their reaching a verdict. I don't think there is anything to indicate there has been a verdict reached in this case as yet, or a deliberation.

Mr. MELLOTT. I think there is enough indication.

The COURT. You are entitled to think what you want.

Mr. MELLOTT. Your Honor——

The COURT. I am not going into that.

Mr. MELLOTT. On behalf of my client——

The COURT. File a motion now, if you wish.

Mr. MELLOTT. I now move for a mistrial based on what has been disclosed. I do not want the panel as a whole interrogated. I would like the procedure followed [14,517] that I outlined previously.

The COURT. I am going to ask the panel as a whole, in light of your motion, because I think I have a duty now. You are putting me—you are sandbagging me now. I will ask the jury, in view of your motion.

Mr. MELLOTT. Well, if you are going to do that, Your Honor, you force me to withdraw the motion.

Mr. BARTLIT. Your Honor, I would object to the court doing that. I think the cases say it cannot be done over the objection of a defendant.

The COURT. You may make that motion. You may make that motion that any time after the jury has commenced its deliberations, but if you make it now, I think I have to do something. I think you are forcing my hand and I will have to do something then.

Mr. MELLOTT. I said as part of my motion——

The COURT. You cannot condition your motion that way.

Mr. DELONE. I think I can. The cases that—granted, this is a week-end research——

The COURT. You can make a motion for a mistrial based on a condition?

Mr. DELONE. No, that it is proper [14,518] to raise a subject such as we are raising, whether there have been premature discussions, premature deliberations.

The COURT. Yes, it is proper.

Mr. DELONE. At the same time requesting Your Honor——

The COURT. I think you are right.

Mr. DELONE.——not to interrogate the jury.

The COURT. I will interrogate them one at a time in the jury room now.

I think that the matter is of sufficient importance now, that I should do that, and I will interrogate the jurors one at a time in the conference room, and you may all be present.

Mr. MELLOTT. If Your Honor please, I withdrew the motion, if that condition is placed upon it.

The COURT. It is not a condition. It is what I am going to do.

Mr. MELLOTT. I will not make the motion now.

The COURT. I think I owe the duty to do that, anyway, in view of the posture of the case.

Mr. MELLOTT. I will object on behalf of my client to your interrogating the jury individually at this time.

[14,519] The COURT. Mr. DeLone, what is your view?

Mr. DELONE. My view is that——

The COURT. On this question, please.

Mr. DELONE. My view is that the three alternates should be interrogated only.

The COURT. No, no. That is not what I asked.

Mr. DELONE. My view is——

The COURT. I asked your view as to the proposition as to whether or not the jurors should not be interrogated one at a time.

Mr. DELONE. My view is on that, the only jurors who should be interrogated now is the alternates and if that indicates some impropriety, we should go beyond, but there is the concern——

The COURT. I want to know what your answer is to the question as I posed it.

Mr. DELONE. The answer to your question, as you posed it, I do not think you should interview the panel.

The COURT. Do you object to my doing it?

Mr. DELONE. No, but question the others——

[14,520] The COURT. I will not interrogate the alternates. They may be members of the jury before we are finished. I can't do that.

Mr. Keck.

Mr. KECK. I would object to interrogating the jurors before they deliberate.

The COURT. Mr. McSweeney.

Mr. MCSWEENEY. I object to the interrogation of the jurors.

The COURT. Mr. Fricano.

Mr. FRICANO. I am satisfied with the record. I think Your Honor has stated it quite correctly.

The COURT. Now I am coming to the $64 question.

Mr. Bartlit.

Mr. BARTLIT. I have already objected.

The COURT. Mr. Warnke.

Mr. WARNKE. I would object. I think it would be prejudicial to my client.

The COURT. Then I will not do it.

To interrogate the alternates when we might have to put them in that jury—one could get sick this afternoon—it is improper to do that.

Mr. MELLOTT. My request was we do it after the jury is retired.

[14,521] Mr. FRICANO. May I make one statement? When I said I am satisfied with the record, if counsel had indicated to Your Honor unanimously they wished to have this done, I would not have objected to that.

The COURT. I would have done it, if counsel said they wanted it done.

Mr. FRICANO. I want to make it clear under those circumstances, I would not have objected.

The COURT. If counsel said they wanted it, I would have done it. I would have done it as a panel or individually, if counsel said they wanted to. I am leaning over backward to do what you want insofar as it is proper to do that.

But I intend to instruct the alternate jurors to enter into no discussion of anything as to this matter or anything after they are discharged.

Mr. WARNKE. I think Your Honor has made his position entirely clear, and I see the dilemma this poses for all of us.

The COURT. Including me.

Mr. WARNKE. That is what I mean. I feel as far as interrogating the jurors at this point, that could prejudice them, particularly since Mr. Bartlit and I are still on tap as far as the final arguments are concerned.

[14,522] As I understand your feelings, while the jury is deliberating the interrogating of the former alternates would raise problems that you feel would be improper?

The COURT. I feel they have been meeting together and eating together and talking together for four months. I am certain that each of those alternates know how other members of this jury feel. That does not mean they have deliberated and reached a decision. That is a totally different kind of question, and I don't think there is anything to indicate there has been any deliberations or any votes. I think there has been nothing more than a semi-neurotic woman who said that she thinks the jurors have indicated some—that the majority of them are in favor of the prosecution. But she didn't say that, either.

Mr. FRICANO. She didn't say that.

The COURT. She didn't say which way they were. She indicated of the 12 original jurors there is 11 that lean one way and 1 the other.

Mr. DELONE. We won't know until we know what she meant by that.

The COURT. If that should become at some time pertinent, then we will handle it, but not now.

I agree that woman has to have counsel and be warned of her privileges under the Fifth Amendment to [14,523] decline to say anything further, because I think she did violate the law. At least there is a possibility she did violate the law. Certainly she had no right to discuss anything with a defendant.

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[14,524] Mr. FRICANO. • • •

I anticipate, though, that Mr. Bartlit may very well raise two points which I think should not be raised.

Number one, as he did in his opening statement, he may again refer to the prison term.

[14,525] Mr. BARTLIT. Absolutely not. The Judge made it very clear to me. I think I would be insane, after getting grabbed by Judge Teitelbaum.

Mr FRICANO. Secondly, there is a possibility, in light of some questions and answers in the transcript—some people say they mean one thing and some people say another thing—in light of that, and frankly, it came as a surprise to me that there were some new exhibits that have been used for summations that I have not seen before. That came as a surprise.

The COURT. There was no objection, or I wouldn't have permitted that to be done.

Mr. BARTLIT. I have made blow-ups of pages of the transcript. That is only for argument, an exhibit, and that is what——

Mr. FRICANO. That is what I anticipated and I object.

The COURT. I will permit you to do that, if it is in evidence.

Mr. FRICANO. Not the transcript.

The COURT. You have not blown up the transcript?

Mr. BARTLIT. I have blown up the transcript, the questions and answers.

The COURT. You can say it, but you [14,526] cannot use the exhibit.

Mr. BARTLIT. This is important, and I don't press points unless they are terribly important. That is—he said squarely in the record things that a witness said.

The COURT. You can say things.

Mr. BARTLIT. Yes, sir, but I have got to show them. If I say it and somebody argues it, I have to show them that page of the transcript.

The COURT. I can't let you do that.

Mr. BARTLIT. It is done all the time.

The COURT. Oh, it is not here. Demonstrative matters of that kind are not normally used in a closing.

Mr. BARTLIT. It is not evidence. You can argue to a jury. You can take a blackboard and make any chart. In every injury case that is tried, they write up their questions and answers, what the witness said. That is done all the time. This is to save time.

The COURT. Not in the closing.

Mr. BARTLIT. Yes, sir, in injury cases the top lawyers, they take the damage exhibits and they write them up there and emphasize them.

The COURT. They do it during the case and it is there.

[14,527] Mr. BARTLIT. They argue from it, the questions and the answers and I saw the intersection and so forth. That is emphasis. It doesn't go to the jury.

The COURT. You may pick up a transcript and read it, but I won't let you put——

Mr. BARTLIT. Your Honor——

The COURT. No soap, no way.

Mr. BARTLIT. Your Honor, when a prosecutor has misquoted the record and I am not permitted in the most graphic, strong way to show the jury that it is not right, Judge——

The COURT. You can stand up with the transcript and read it.

Mr. BARTLIT. Why can't I show it to them? That is emphasis. It is testimony in the record that I want to emphasize to that jury.

The COURT. Go ahead and do it.

Mr. FRICANO. Your Honor——

The COURT. That means you can do it in rebuttal.

Mr. FRICANO. I can't blow up transcript now. I could have done it throughout my case. You said at the outset, at page 131 of the record, when you talked to the jury, "While the court reporters will be taking down the transcript, it is not going to be available."

[14,528] You made that clear and Mr. Bartlit is taking that and running in the other direction. That will open up a Pandora's Box in this district.

Mr. BARTLIT. It is argument and emphasis.

Mr. FRICANO. He is loquacious. Your Honor——

The COURT. I never saw it done.

Mr. BARTLIT. Your Honor, it is done all the time. It is done in civil cases. Maybe nobody thought of it.

The COURT. I thought of it and I was told I couldn't do it on numerous occasions. I will stand by my ruling.

Mr. BARTLIT. Your Honor, I have got to do it. I will never make my point otherwise. The prosecutor called my man a liar.

The COURT. You can pick up the transcript and read. You can read it.

Mr. BARTLIT. I plead with you, Your Honor.

The COURT. No, no.

Mr. BARTLIT. I am serious.

The COURT. I have ruled. That is all. No more.

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[14,529] Mr. BARTLIT. Your Honor, I have two pages. All I want to do is on these two—I have done the right thing through this trial.

The COURT. I will tell you what I will let you do. I will recess long enough for you to have those two pages copied and you can pass them out to the jury and take them back again.

Mr. BARTLIT. Your Honor, this is quicker and easier.

The COURT. No, it is not. I am not willing to have the other done.

If you want to, I will let you—I will recess [14,530] long enough for you to have somebody make fifteen copies of it, and you can hand it to that jury and take it back, but I don't want a big exhibit in court.

Mr. BARTLIT. I will have to blow it down.

The COURT. That is right. You use the normal size of the transcript.

Mr. FRICANO. My objection——

The COURT. I will let him do that, because he is going to read it to them. It is in the record.

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[14,533] • • • The jury was duly seated.)

The COURT. Good morning, ladies and gentlemen.

May I have just a moment? I want to read something here. (Studying documents).

Ladies and gentlemen of the jury, you recall, now, that before I sent you home for the long weekend, I instructed you that you were not to discuss this case with anyone and not to discuss it among yourselves. I trust that everybody has followed those instructions.

Is there any member of this jury who has not followed my instructions? If so, I would like you to so indicate at this time. (No response.)

All right. You may close to the jury, Mr. Bartlit.

Mr. BARTLIT. Thank you, Your Honor.

The COURT. Excuse me.

Before you start, would you swear the jury on whether the answers they were giving to that question I directed to them are true and correct, Mr. Grainer?

(The Clerk administered an oath to the jury.)

The COURT. All right.

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WATT CLOSING ARGUMENT

[14,544] Mr. BARTLIT. • • •

Now, what happened? The first crack out of the box in this trial, the Government made an appeal to prejudice, which has continued throughout the trial. In the opening statement,

and repeatedly we had the statement about plush resorts, golf courses, swimming pools, tennis courts, repeated again and again and again, to the point where Judge Teitelbaum said, at page 649, "We don't care what's plush and what isn't. It is what happens that counts."

Other examples of an appeal to prejudice. Mr. [14,545] Fricano started out by saying, properly, that corporations are entitled to make profits, but, again, he started talking out of the other side of his mouth. He talked about big corporations with fat profits, high and excessive profits, that sort of thing. He talked about the club, the tight little group.

Now, the evidence shows, as I am going to show you, that there certainly were not excessive profits, but that isn't the point. The critical point is why do you do these things? Prejudice is an ugly word, and the reason it is ugly is because people use prejudice when they want somebody to make a decision not based on the facts.

You see, if you have the facts, and the facts are right, then you just lay them in front of somebody and they say that's right, and they make the decision. But if you don't have the facts, that's when you try to make the person that's going to make the decision hate the other person. You want to prey on their emotions. You want an irrational decision. You don't want a decision made properly ,with the facts. So, you know, and that's the reason why we have striven, and everybody has or most people, I should say, are striving so much to get rid of prejudice in the world today, because as soon as you get prejudice, you don't get fair, proper decisions; the exact opposite, the exact opposite of fairness. If fairness is here, prejudice is [14,546] here.

And ladies and gentlemen, that's a clue. That's a clue. When you know your common sense tells you in your life that when you see somebody using prejudice, that's a clue that they don't have the facts. Now, that's the first clue.

[14,547] Mr. BARTLIT. What are some other clues for you? Well, do you remember, Judge Teitelbaum said, at the outset, the only evidence are answers, not questions. Questions aren't evidence, and I think you saw, during the trial some glaring examples of why he gave that instruction.

There is a technique used by competent, good trial lawyers that want to win cases, called planting the seed. In other words, you may not have any evidence, but, if you ask a question, the

question, enough ways, maybe you will plant in the jury's minds the seed of something that is not really there.

For example, you may ask somebody who wasn't even at a meeting, "Did you know that, at that meeting, Mr. Smith and Mr. Jones fixed the price?" You don't care what answer you get. You don't care whether it is yes or no, because, with the question, you have planted the seeds, and, if you do that again and again and again, over a long trial, maybe the jury will get mixed up in their minds the difference betwen the question and the answer. And that technique, as you know, was used repeatedly by the prosecution in this case.

Judge Teitelbaum repeatedly instructed, with Mr. Abnee, "The question is not evidence," With Mr. McCaskill, "You recall my original instructions; questions are not evidence." Judge Teitelbaum kept telling you, [14,548] "Ignore those questions."

Finally, at page 4,445, he said—this is Judge Teitelbaum—"Mr. Fricano has a way of asking those questions as if it were a fact. I would prefer him to ask the question whether there was a price increase, but he has his ingrained habits, so you remember, the question is not evidence."

Now, that is the second clue. If you have evidence, you don't have to try to plant a seed of something that isn't there by using that kind of tactic.

Occasionally, in using this tactic, the prosecutor would—there would be an objection, and the prosecutor would very humbly withdraw. "I am sorry, I shouldn't have asked that," and there would be somewhat of a show of being sorry of having done something that shouldn't have been done.

Of course, at that point, the prosecutor doesn't care, because the seed has been planted, and that is the only thing he is trying to do.

In this trial, there have been numerous occasions where the prosecution has read only parts of a document, and it has been necessary for the defense to read another part of the document to bring out all of the facts.

A typical exhibit was Government Exhibit 1045–C. The Government read a part of the document that shows that [14,549] Mr. Fredericks—Mr. Fredericks was from Georgia-Pacific—was scheduling a meeting with Mr. Morgan. Then, we had to read the rest of the document, that showed that the meeting was to discuss manufacturing facilities.

Now, that may seem like a small point, but you are going to see, I think, when you weave all of these things together, you see a conduct, you see a way of doing things, that is a clue to you.

The prosecution has an ability to, by voice, by facial gestures, and by mannerisms, to try to indicate to you or get across to you facts that aren't there. Now, that is what a good actor does, and I am not criticizing it, but I am saying that I want you to be aware of this. Mr. Fricano is able, by his courtroom ability—he could ask your address and make it sound bad. He could say to you, "Isn't it a fact," with the pointing finger, "that you live at 600 Grant Street," and then, no matter what you answered, he could turn to you and go like that (indicating), and maybe somebody would think that the witness was lying—not because of anything the witness said, but because of something the prosecutor did.

Now, again, I don't criticize that sort of thing, but I want you to understand what has been going on here, so you can judge this fairly. I am sure you are aware—let me make another point.

[14,550] There were a couple of—I think maybe you will find them amusing. There are a couple of little tricks that the prosecution engaged in, which ought to provide pretty good clues to you.

You remember Mr. Simpson. Now, Mr. Fricano tried to create the impression with you that Mr. Simpson was an unwilling witness, who was dragged in here by the scruff of his neck, and he tried to create that impression because, obviously, if he is an unwilling witness, maybe he will be more credible.

Now, this is at page 1,842 and 43 of the transcript. All of these things I am telling you about are out of that printed record. I didn't make them up. I can back up everything I say.

Mr. Simpson blurted out he was appearing voluntarily. I am sure he figured that out, but he blurted it out, and the prosecutor went through the routine. "Weren't you served with a subpoena?" The idea was, if you were served a subpoena, you were dragged in, unwilling, and the Government is bringing you down to cross examine, to wring out these things. So he tried to, after Simpson blurted out he was here willingly, Mr. Fricano went through this routine about a subpoena commanding appearance.

Judge Teitelbaum then said, "Well, you were served—" this is page 1,843—"Well, you were served [14,551] but you were willing to come." Mr. Simpson said, "Yes;" so Judge Teitelbaum brought that out.

And the only thing I can say, the only way I can read that, is that the prosecutor was trying to fool you. He was trying to make you think a witness is an unwilling witness.

Let's talk about something else. In his final argument, Mr. Fricano said he was talking about the instructions that the Court would give to you, and he said—this is page 13,849.

"Now, I am going to try to anticipate the Court's charge in this regard. Of course, if I am wrong, I am wrong." And then he says, "But if I am right, I am right."

And then he goes on to say what he believes the Court will charge.

Ladies and gentlemen, he knew what the Court was going to charge, because, as Mr. McSweeney said yesterday, Judge Teitelbaum had told us the day before.

Now, why, when you know what the Court is going to say, do you try to make it look like you are going to guess, and you are the expert, and you think the judge will do that? You do it because you hope, after the jury hears the charge, you say, "Mr. Fricano is okay. He is a smart man. He knows what the judge is going to do before anybody else did." He knows that because the judge told him, and he [14,552] told us. That is not a big point, but it is a clue that anybody, in a case of this importance, who engaged in that kind of shenanigans to try to fool you, particularly when he is a good, skillful, experienced, competent prosecutor, he does that because he doesn't have a case.

You don't risk having another lawyer stand up here and explain how you tried to fool the jury, if you have the facts. You just lay the facts out. He tried to fool you.

Now, as I explained, there are reasons for doing things like this, and I suppose that, if this was done once or twice or a few times, you might say, "Well, everybody slips," and everybody does. Nobody is perfect, but, when you see it done again and again and again, every tactic in the book, by a shrewd, crafty, courtroom operator, you know that it is purposeful. You know that it is intentional, and your common sense tells you that it is

being done because there is not a case there, and the jury is trying to be distracted onto other issues.

* * * * *

[14,559] * * *

He says, "He," meaning Fred Bartlit, "he had a contemporaneous document prior to the time of the November 17 announcement in Watt's own handwriting that he talked to Moran of Flintkote, Walter of Celotex, Fredericks of Georgia-Pacific, with respect to his assignment, and one of those assignments was credit."

So the prosecutor told you that I was trying to fool you when I used that, when I explained about the mineral wool, and why Andy Watt—Andrew Watt went down to meet with Jim Walter, and he said that while I made that argument to you that I had in my hand a document that showed that that wasn't true.

Now, let's look at that document.

[14,560] Mr. BARTLIT. Now, I want you to remember—and I am going to take some time with some of these things because I think that, when the prosecutor makes accusations like that, and the evidence shows that they are not true, that is a very important clue for you to consider when you are considering Andrew Watt.

Now, here is the document. Mr. Fricano says that, while I had Mr.—while Mr. Watt was up there explaining about mineral wool, that I had in my pocket a document that showed—contemporaneous document, prior to the time of the November 17 announcement that he talked about assignments with Moran, Walter, and Fredericks. What is the date? December 16, 1965, a month later. So I didn't have in my pocket, as he said, a document prior to the time of the November 17 announcement that he talked with Moran of Flintkote, Walter, and Fredericks. The document is a month later. It is not earlier.

Secondly, he said that the document showed that one of the assignments was credit. Okay. Here were the areas of interest. I don't have to read this for you. You can read it. Point one doesn't say anything about credit.

Can everybody see that? That is point one. It just doesn't say anything about credit.

Let's look at points two and three. Two and three, fire and sound tests, industry advertising, three points. Nothing about credit.

[14,561] The document was not before November 17, and it said nothing about credit; and, yet, the prosecutor said that I was trying to set up a story, because I had some document in my pocket, which just doesn't exist. That is another clue.

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DISCUSSION

[14,568] The COURT. Gentlemen, the Government has submitted a supplemental request for charge in reference to Defendants Robinson-Patman Act contentions. The request is rejected as being untimely. However, I am charging in substance concerning this matter.

I want to also state for the record that I gave the jury—I interrogated the jury in accordance with the recommendation of the Court of Appeals in the United States of America versus Michael Piancone. They having been separated, I asked them whether any one of them had discussed this case with any other person or among themselves. They all indicated—and I asked them to indicate if any one of them had, and no one so indicated.

I then asked counsel if they wished me to make any further inquiry of the jury, and was advised nobody wished any further inquiry of the jury at this time.

Bring in the jury, please.

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PROSECUTION REBUTTAL

[14,693] Mr. FRICANO. • • •

Now, just think back for a minute what all these words that they have used to characterize me—in fact, you may think I have horns coming out of my head. Well, I don't. I don't. It has been said in this courtroom on more than one occasion that I used tactics to prejudice the Defendants, to give them an unfair trial.

Ladies and gentlemen of this jury, if these Defendants had received an unfair trial, I would not be standing here before

you now. This would not be a case. This case would have been dismissed long ago.

Judge Teitelbaum has made sure for over four months, now, that they received a fair trial, because that is our system. That is our system of jurisprudence.

I think someone pointed out the fact that Judge Teitelbaum is here to make sure that nobody oversteps, because when you are in the middle of a fight, when you are in the middle of trying to present evidence, whether you are the prosecution or whether you are the defendant, and when the matter is as hardly fought as this case has been, there are going to be times when tempers will fly. I think that anyone can recognize that. We all, [14,694] from time to time, get a little uptight.

So if you believe, you cannot believe—I withdraw that—you cannot believe that anything I did gave these Defendants an unfair trial, for, as I say, we would not be here. You would be home; I would be home; and that would be the end of it. But the fact is we are here right now.

Now, think about this, also, in connection with the accusations which have been levied against me. You have heard certain attorneys in this room quote from judges about time and so forth and so on. Well, there is another old saying among trial lawyers, which I am one: If you have got a bad case, try the prosecution. Don't meet the facts head on. Try the prosecutor. Dump on him.

What have you been hearing lately? I submit, ladies and gentlemen, the last two arguments that you heard, for over four hours, was a dump on.

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[14,698] Mr. FRICANO. Mr. Warnke, the businessman's lawyer. Remember what Mr.. Keck said about a businessman's lawyer? A businessman's lawyer is a very conservative person.

Now, he represents a businessman, and, when he looks at a document that speaks and bespeaks conspiracy and cover-up, he says, "I think that is very good advice."

You cannot talk about 13 years of conspiracy without pointing a finger of cover-up. They wouldn't have gotten away with it that long. They never would have gotten away with it for that period of time if they hadn't taken steps to build that sham, build that smoke screen.

Mr. Warnke goes on, with respect to this document, which I did characterize as one of the two most important documents in this case, because upon this document you see your cover-up, you see your sham. Not only do you see it with respect to the pricing discussion that Mr. Atwell cautioned his people not to make records of, but you also see this is the sham of the Robinson-Patman Act.

Now, I never said, as Mr. DeLone, I think, said the other day, that the Robinson-Patman Act is a sham. No. It is the law of the United States, and all of its citizens, all of us have to abide by that law, that Robinson-Patman Act. What I said was the defense of the Robinson-Patman Act is a sham conjured up for this case.

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[14,710] Mr. FRICANO. • • •

Now, as I develop the argument here, and, more specifically, the facts on rebuttal, I would like to just say a couple of things. I promise I won't repeat them again. Everybody said, in essence, the inference is that I have got a big advantage because I speak last. Now, maybe you have gotten the impression by this that I kind of masterminded this in some way. Well, I didn't.

This is basically the procedure that is followed throughout the United States in federal courts. In fact, the new rules specifically provide that the Government closes first; defendants answer and, then, the Government has a rebuttal argument. Now, one of the reasons,—there are two reasons. I can't go into the second one with you because that's a matter of law and that deals with appellate courts. But one of the reasons that the Government closes last, has this rebuttal right now, is because we have the burden of proof. We must prove, and it is correct, and the [14,711] Judge will instruct you, we must prove these Defendants guilty beyond a reasonable doubt. There is no question about that. We don't hide from it.

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[14,717] The Court: Mr. Fricano, you may conclude your rebuttal tomorrow morning.

Mr. FRICANO. Thank you, Your Honor.

The COURT. Ladies and gentlemen, you have heard all you are going to hear from any of the defense counsel. They have

concluded their closing arguments. The prosecution will continue their rebuttal tomorrow morning, and then I will charge the jury.

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[14,739] Mr. FRICANO. If I was trying to mislead this jury by saying I believe that Judge Teitelbaum is going to charge you in a particular fashion, then when Mr. DeLone said, and I quote,

"As I suspect Judge Teitelbaum will charge you", and when Mr. Warnke said,

"As I believe the Court will charge you", does that mean, folks, that Mr. Bartlit says that Mr. DeLone and Mr. Warnke were trying to prejudice you? Of course not. That is preposterous, absolutely preposterous. His co-counsel used the same precautionary language because the plain fact is a judge can change his mind.

Judge Teitelbaum did go over his charge with us. He outlined it. He gave us a broad picture of what he was going to charge, but he is not committed to that. He can change his mind as he is giving you the charge. He has something written on a piece of paper which he will use as a guide. He will not look at the paper all the time. He may see something and say to himself,

"I don't think it is right. I will give it this way."

• • • • •

[14,749] Mr. FRICANO. • • •

In 1964, Huckleberry is finally driven out of business. He leaves in January of 1965. He sells out his interest for $200,000.

What is going on, in 1964, about trucking? Bear in mind, this whole Huckleberry thing started with trucking.

In 1964, in September of 1964, Mr. Anderberg on the west coast, United States Gypsum, writes to Mr. Lane, United States Gypsum, about Pabco trucking in California—same year, same problem. And what does Mr. Anderberg tell [14,750] Mr. Lane about Pabco trucking in California?

> I see the serious potential of all of this, but why must we stand still for Pabco trucking? Can Watt explore and let them know the implication of their action?

> From a sales standpoint, we cannot ignore 500 to 750 MSF of business.

Now, there is trucking. There is trucking, right in the nutshell. And who was president of the association, right when all this is going on? Who was president of the association from October of 1963 through April of 1965? Andrew J. Watt. That is stipulated. He was president from October of '63 through April of '65, right when they were killing Huckleberry, right at a time—right at a time when his subordinates are asking him to go talk to Fibreboard and warn them about the implications of trucking.

Mr. BARTLIT. Objection, Your Honor. That misstates the record.

The COURT. Overruled. Proceed.

You will use your own recollection of the testimony and the closing, and the fact that Mr. Bartlit states it misstated the record doesn't mean that it did.

Proceed.

Mr. FRICANO. Thank you, Your Honor.

It is GX 121, page two.

You know these facts. You know, in 1964, [14,751] Huckleberry was being killed. You know, in 1964, Andy Watt was president of the association. You know, in 1964, he was exchanging prices, terms and conditions of sale with his competitors. You know his subordinates were doing it.

1964. What else happened in 1964, this year?

Water-resistant board. Same year, 1964, September, 1964. National Gypsum comes out—is about to come out, according to this, with a new product, water-resistant board. What happens? They are not certain about whether or not they got it, and, if they do have it, what prices they were going to charge.

This is United States Gypsum. They are not certain. So what happens? Little old note at the bottom, Atwell from Bud Weiser, writing to Joe O'Brien, both of whom you have heard their names, time and time again, in this record—were implored to exchange prices and terms and conditions of sale with their competitors. Atwell. On the basis of this note, Joe O'Brien writes back to Weiser, in September:

> National either has or will shortly have a product similar to our water-resistant. Their f.o.b. mill base will be competitive to ours. Their manufacturing and shipping points will match ours. Equalized freight will be

> added to the mill price, the equalized freight to be [14,752] calculated from either the National or competitive mill making the rate.

Is that making it right? Is that a flight of fancy? Is that imagination, or is that a smoking gun?

He could only have gotten that information one place. He got it from National. National told him. Mr. Atwell told him exactly what they were going to do. Why?

Mr. DELONE. I object to that, in light of the very exhibit which shows that the report came from the field.

The COURT. Gentlemen, please do not do that kind of thing. Facts are for the jury, and this is the third time this kind of thing has happened.

I do not mean to preclude anybody from objecting to a matter of substance, but matters of record are for the jury, and I feel that interruption of the charge in that manner is pure harassment.

Proceed.

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[14,758] Mr. FRICANO. • • •

Now you wonder why I shouted coverup and smoke screen and sham. I didn't think we were going to get it in closing arguments, though.

Okay. This is not going to take long.

1970, single plant producers, Mr. Keck said that, "United States Gypsum would not go below its cost of meeting competition during this 1970 price war."

He also said, "Here are two concrete examples of reported prices lower than $26, which is his cost, yet United States Gypsum stopped and offered only $26 and considered that rock bottom."

Now, Mr. Busch testified—and he is the Southern Central Products manager—he testified concerning the $26 as follows:

He also said that his cost in his region, the Southern Central, all the way across, was $26.

> Question. What did you do? Did you continue to sell in that area, that is at $26?
>
> Answer. Well, first of all, it is against the law to do that, to sell below cost. And the second thing is we didn't do it.

Twenty-three times, out of their own boxes, 1970. [14,759] P. A., one-half inch Sheetrock wallboard, $25. That is one. Guess who shipped it? Busch, the same guy who said we would not go below $26, because that would be against the law, his name is right there, E. L. Busch. 1970, ladies and gentlemen, Texas.

Who were they meeting? Georgia-Pacific on that. Excuse me. Who were they meeting. National. National had offered that $25 and United States Gypsum came in and met that price below cost. That is predatory. Now, of course, you can't take Mr. Busch's charge that is illegal, but that is what he believed at the time. But he did it.

[14,760] Mr. FRICANO. May 15, 1970, one-half inch sheet rock, $25, a P/A approved, United States Gypsum, Texas. Who were they meeting? Flintkote in San Antonio.

I don't want to—there is a lot of cardboard here. This would be a lot thinner. There are 21 examples here. I will go through them very quickly. I just gave you that one.

May 12, 1970, price $25, meeting Georgia-Pacific at San Antonio.

May 15, 1970, meeting Flintkote, $25, San Antonio.

June 5, $25, San Antonio, meeting National.

Flintkote, May 8, $25, San Antonio.

Flintkote again on May 8.

In fact, there is three Flintkote's on May 8, $25 where United States Gypsum is offering and meeting and approving prices below its cost.

[14,761] Mr. FRICANO. May 7, 1970, Georgia-Pacific, $25; San Antonio.

May 27, National, $25, San Antonio.

May 22, Georgia-Pacific, $25.50, San Antonio.

Two to Georgia-Pacific on June 16 and May 15; $25.30 and $25.90, San Antonio.

Celotex, June 2, 1970; $25, San Antonio.

And there they are, right down, 21 instances.

You heard Mr. Keck, they wouldn't sell below their costs, and there you got it, right in the middle, that Republic situation, where Republic was trying to pull itself up by its bootstraps, when they had issued a price increase of $10, and everybody had followed to 32, and then, subsequently, when they tried again, United States Gypsum, without any provocation at all, dropped the price down to 26, and that was

their cost, selling—just consider this, even at cost, in this situation, knowing that the single-plant producer is on the ropes.

Mr. Keck tells you he wouldn't do that. Page 25, 1242, 45—that is what he said, 21 smoking guns, 1970. You can't ignore this.

And I guess I have to say it. 1970 is what? The statutory period, ladies and gentlemen, 1969, May 1, 1969.

• • • • • •

[14,772] • • •

Well, I am going to talk to you about vinyl wallboard as soon as I get through talking to you about this. And I am going to prove to you from the record that vinyl wallboard just as sheathing, has been in this case since the beginning.

Now, let's look at the other counties where Georgia-Pacific showed pink sheet prices for one-half inch. Same pattern on the sheathing prices is ascertainable and is the fact in Minneapolis, Atlanta, and Washington, D.C. Price increase in May, 1969, for both one-half and regular, and sheathing. In January, 1970 the list price of one-half inch falls while the list price of one-half inch sheathing goes up. They kind of shoved that one under the table. They didn't even show that with Dr. Cyert.

What would Dr. Cyert had done with the sheathing price increases with all this so-called rampant competition? If I have heard that word once, I have heard it a thousand times. Rampant competition. They didn't show you sheathing. Dr. Cyert didn't comment on it. Do you know why? Because there would be very little dispersion—very little [14,773] dispersion. If we plotted the dots in the lines to see the price spread on sheathing, it would be like this. [Indicating.] Then what would Dr. Cyert say?

Mr. MELLOTT. If the Court please, I object to this portion of his argument. It is not proper rebuttal. It is being raised now for the first time by Mr. Fricano, and it was not raised in any argument that he made before at any time, was not covered in the arguments of any defense counsel, and it is therefore not proper rebuttal.

The COURT. What concerns me is I don't recall any evidence concerning the plotting of prices of sheathing anyway.

Mr. MELLOTT. There is none, Your Honor.

Mr. FRICANO. There is none.

The COURT. I sustain the objection then.

Mr. FRICANO. All right. Now, with respect to sheathing the prices did go up. All right. So maybe we didn't have a sheathing—as the Court correctly pointed out—we didn't have a dispersion chart on sheathing. But let's talk about the $26 price in Texas.

Now, someone from this jury asked a question of Dr. Cyert: "Why didn't you have a chart for Dallas?" He could have picked Dallas.

[14,774] Now I am going to tell you why he didn't pick Dallas. Because the prices were low in Dallas. And you know what there would be on the dispersal chart in Dallas? No dispersion. You'd see $26 right across.

Mr. DELONE. I object to the same thing. There is no evidence of that, Your Honor.

Mr. FRICANO. That's fair argument, Your Honor, because the price in Dallas was $26, and we have established it through the . . .

The COURT. Proceed.

Mr. FRICANO. They didn't show Dr. Cyert that one either. They showed him one-half inch regular, which was the volume item certainly, but where the single plant producers were competing.

Vinyl wallboard.

Mr. Mellott said we had no idea until Mr. Fricano's closing that he was contending that vinyl wallboard was involved in this case. Let's take a look at that one. Let's take a look at the indictment first. The indictment in this case says the products involved here are gypsum board machine products. Inclusively.

A gypsum board machine product is vinyl wallboard. That 's number one.

• • • • •

[14,790] Mr. Fricano. • • •

Now, the Defendants have argued—Mr. Bartlit, specifically, that the job price protection register was to prevent fraud and double and triple—boy!—double and triple protection by dealers.

Well, let's explore that one, just for a moment.

First of all, let's clear one thing up. It is not fraud.

Do you recall Judge Teitelbaum specifically asking Mr. Watt whether there was a legally binding contract that was involved between a dealer and a manufacturer; and Mr. Watt said no.

There cannot be fraud if there is not a legally binding contract. Fraud is a legal concept. There may have been some moral responsibility, but not legal responsibility.

Now, they say the job price protection register and the exchange of job price protection information was to prevent double protection.

That is sheer nonsense. The very checking contributed to the double protection. Follow this. It is only when they had something that told them, a competitor [14,791] told them, or from the field, that a competitor was offering job price protection—it was at that time that they checked with the competitor to see if, in fact, they were offering job price protection, at the time the competitor was offering job price protection. What did the inquiring competitor do? He offered it, too. They, themselves, were responsible for double protection.

Now think about that. They talked to each other. "Are you offering job price protection on that job?"

"Yes, I am."

"Then I am going to offer it, too."

They contributed to the very practice that they say they were trying to prevent themselves from falling into. Their very practice of exchanging this information led to double and triple protection.

What the Court said Mr. Watt——

> The COURT. When there is a job price protection, do you have a contract, then, with a contractor, that he may not buy board from anyone but you?
>
> The WITNESS. No, sir. Job protection works one way in terms of the contract. He makes an agreement with us he will buy the board for that job with us for a price, and whether it is a price increase or it is a period of time I think he has.

[14,792] The COURT. Does he have a right to supplement the board he buys from you with board from someone else, is what I want to know. Is there any rule?

The WITNESS. We think it is a moral commitment, when he has given us the order.

The COURT. I am not asking about a moral commitment. Mr. Fricano asked about fraud. I am asking whether he can't buy it from anybody but you.

The WITNESS. No, sir. He can change his mind.

Exchange of job price protection, ladies and gentlemen, was to stabilize prices; was to make sure that, when announcement dates, effective dates came around for price increases, they could tell each other that effective date had gone in, and there would be no price protection, which would erode that price increase. And that, folks, is part of your so-called verification story.

With respect to that exchange of job price protection information which contributed, as I have just told you—and it is clear—to double protection, the other side of that, as I have just noted, when they checked with each other and they were offering job price protection, none was offered. Neither side did—keeping that price up, [14,793] making sure the price increase held.

* * * * *

Mr. McSweeny—although he got somewhat emotional—we all have a tendency to get emotional in these matters—said he wished Don Miller were here to talk to you.

So do I. I would like to confront Mr. Miller with the documents we have from Georgia-Pacific files. I would have liked to have confronted him with Mr. Nelson's statement concerning that Tacoma drywall situation, where Mr. Miller told Mr. Nelson over the telephone that he was in contact with his competitors, because that would be collusion. I would have liked to have put that document in front of Mr. Miller and asked him, "Mr. Miller, why did you lie?" I would have liked to have heard his answer.

Bear in mind, also, ladies and gentlemen, when [14,794] you saw Mr. Thompson from Celotex and Mr. Miller—excuse me—Mr. Goddard from Celotex, you didn't see Mr. Hildebrand, who is alive and well; Mr. Marvin Greenwood, who was right there throughout that 1955, '56, and '57 period; Mr. William Herbert; Mr. William Lees——

Mr. MCSWEENEY. I object to this, Your Honor. These people were available to subpoena by the Government.

The COURT. All right. Well, first—proceed.

Mr. FRICANO. Last, but not least, Mr. Jim Walter——

The COURT. May I point out that objections do not serve the purpose of rebuttal. That is not the proper purpose, and I don't appreciate it occurring.

Proceed.

Mr. FRICANO. Last, but not least, as I just stated, Mr. Jim Walter, the president of the entire Jim Walter Corporation, of which Celotex is a subsidiary.

* * * * *

[14,810] Mr. FRICANO. * * *

Mr. Keck blew up one page of Exhibit—Government Exhibit 1009. That is dated February 10, 1971, and he asked how this could possibly be any kind of a verification.

That note, dated February 10, 1971, says: "Phoned USG, terms not competitive. In addition, customer not performing."

And then Mr. Keck said, "How could you possibly understand that?"

Well, number one, I think it speaks for itself. "Terms not competitive." This was an exchange of credit information in 1971 between Jarrett—that is, Reth, [14,811] Jarrett's associate—and United States Gypsum, in 1971.

Now, Jarrett testified he had never stopped until 1971, not with anyone. Now, that is in the record. That is unrefuted. That is what Jarrett testified to. There has been no abandonment.

Now, what did Jarrett testify as to this? Mr. Keck didn't tell you what he testified to.

Jarrett said, in response to the Court, that this was a check on extended terms. The Court asked him that question. Again, in 1971.

Again, in 1971, another note by Reth: "These terms are not competitive."

And Mr. Jarrett again testified to that, that was a check with National. National—National, who is supposed to have stopped in 1969.

1015, Johns-Manville, beginning—and this is the middle of 1970. The middle of 1970, when everything was supposed to have stopped. If you turn to page four, up here, you will see listed all the internal goings on of United States Gypsum with respect to credit, as of this date; all of the internal goings on of Kaiser Gypsum, as of this date, the Flintkote Company; Georgia-Pacific; National Gypsum. They—even in this very

document, the credit department of National feels that the deterioration of the credit marketing program of the big three. [14,812] Imagination? Conjecture? Dreams? No, ladies and gentlemen.

The Celotex Corporation.

> The Celotex credit department reports that the bulk of their sales were previously done on a legally oriented job basis, with a firm policy in regards terms, release of lien, and sign-off of joint checks.
>
> Celotex' Los Angeles credit manager reports that he feels it takes five times the man hours to handle a gypsum account, regardless of dollar involvement, than it does a regular product open account.

The middle of 1970, ladies and gentlemen.

Now, do you believe these people stopped? They went underground. Watt took it unto himself. Atwell took it unto himself. Montgomery said he was exchanging prices with Atwell right up to 1971, and that testimony is unrefuted. Baldwin and Galvin change their testimony. The Grand Jury testimony of Galvin reflects he kept checking from October of '67 to November of '68, and the frequency was the same, and he came before you, and he said, "No, I was wrong. I stopped in the spring. I stopped in the summer, because I looked at some monthly reports," and, somehow he divined from monthly reports that competition was severe.

* * * * *

DISCUSSION

[14,815] * * *

The COURT. Mr. Bartlit, you have a motion?

Mr. BARTLIT. Yes, sir, I do. I have a motion on behalf of Andrew Watt for a mistrial. My primary legal authority is U.S. versus Newman, 490 F 2d 39, 1974 Third Circuit case which says:

> When a prosecutor misstates facts in his closing argument, states facts outside the record in such a way to prejudice a defendant, a new trial is required.

Now, the record, Your Honor is loaded——

The COURT. The motion is denied.

Bring in the jury.

Mr. BARTLIT. Your Honor, may I state for the record my objection.

The COURT. After I am finished with my charge you can put your reasons on the record.

Mr. DELONE. I would like to supplement at that time, too, sir.

The COURT. You can do it.

Mr. MELLOTT. I join in the motion, [14,816] Your Honor.

The COURT. All right.

You can all do it after the jury is out.

Mr. DELONE. Very well.

CHARGE TO THE JURY

The COURT. Good afternoon, ladies and gentlemen.

I wish to advise everybody in the courtroom that the doors are locked during the charge, and that no one may enter or leave, with the exception, of course, if we take a recess. Then we will unlock them. So, if there is anyone who feels that he doesn't want to remain during the entire charge, I would suggest that this is the time to leave.

That doesn't apply to counsel or the defendants. Or to the jury.

Lock the door, Mr. Keene.

Ladies and gentlemen, you will recall that I charged you time and again, and instructed that you must not deliberate, you must not discuss the case with each other until you have heard all the evidence, all the arguments, and the final charge of the court.

Now, there wouldn't be much point to my giving a charge if you had already deliberated and arrived at a verdict. We would just be wasting our time.

[14,817] Furthermore, you would be doing that without instruction in the law, and so this is the reason for that charge, for that instruction, and as I asked you the other day, whether anything like that had happened. And you all stated under oath that no such thing had happened.

So I am going on that basis, that as of this time you have not deliberated, you have not reached a verdict, and hopefully each of you has an open mind on what your verdict will be until after the charge is over.

Now, I don't mean by that, that having heard four months of evidence that you don't have impressions. Of course you

must. You heard all the evidence. But a final decision as to the innocence or guilt should not be reached until you have heard the final charge of the Court.

And I am going to ask you all that again: Have any one of you, having heard the evidence and having heard the arguments, reached a conclusion as to innocence or guilt of any of these defendants without having heard the charge of the Court?

No one has indicated that you have. That's fine. That's exactly the way the instructions were given.

Now, you have heard all the evidence, as I have told you, you have heard the very capable and able arguments of counsel. And I can't recall in my experience ever having heard a group of arguments by various counsel that were any [14,818] better or as good perhaps as the arguments that I have heard here in this case by the attorneys for the Government and all of the Defendants.

It now is the traditional time when it becomes my duty to give you the instructions as to the applicable law.

You will recall that I gave you certain preliminary instructions when the case began at the outset of the trial.

In fact, some I think I gave you even before the jury was selected. That was as to contacts with other people and keeping an open mind.

During the course of the trial I have had occasion to give you various instructions on the law, and I am now providing you with further instructions which I deem to be important to your deliberation. I will be repeating some of the instructions which I have already given you. That's because I feel that they must be re-emphasized at this time.

But primarily this constitutes the final and specific instructions for your deliberations.

[14,819] The COURT. You are not to single out one instruction or one phrase or one sentence alone as stating the law, but must consider the instructions as a whole. That includes those given preliminarily and those given in the course of the trial.

Also, you are not to be concerned with the wisdom of any rule of law which I stated to you. Regardless of any opinion you might have as to what the law might be, it would be a violation of your sworn duty to base a verdict on any other view of the law than that given in the instructions of the Court, just as it would be a violation of your sworn duty as judges of

the facts to base a verdict on anything but the evidence in the case.

That includes various statements of law which you heard from various counsel on both sides and a witness. Those matters, of course, are entitled to your respectful consideration, but the law you must accept from me and you must accept it as I state it, without deciding that you think it ought to be some other way. You have to take the law as I give it to you, just as I must take it from what we call stare decisis. That is precedents that have been handed down over the years by other courts or by acts of Congress. I don't make these things up. I charge you upon the law on those bases and you must accept the law as I give it to you.

[14,820] Justice through trial by jury will always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence as is presented to all the jurors, and to arrive at a verdict by applying the same rule of law as given to you in the instructions of the Court.

At the outset I want to state to you that the jury system has been with us for a long time. It has been called the crown point of the common law, the law which we have. It will survive and our system of justice will survive only so long as we have conscientious men and women who are willing to do duty as jurors and willing to find a verdict on the evidence as given to them in the court and the law as stated to the by the Court.

I believe it is fair to say that along with going out to war in defense of your country, there is no duty higher than service on a jury. It is a privilege that many, many people in this world don't have. Many, many people have no ability to serve on a jury or, indeed, to have their cases tried before a jury. Juries serve an important purpose. They serve to stand between the Government and the defendant. And I include in the Government not only the prosecutor, but me. Not necessarily me, but a judge. It is a jury that is the protection of the individual against the tyrannical judge, if you will, or an overeager [14,821] prosecutor, if you will. So this is a very, very important function which you serve.

I would hope that we have no unfair prosecutors in this great country of ours. I would hope that we have no overbearing judges who are devoted to carrying out their own whims rather than justice. I would hope we don't, but the protection is you. The protection is the jury.

Now you have been chosen as jurors on this case to try the issues of fact presented by the allegations of the indictment and the denials made by the not guilty plea of the Defendants, each of them. You must perform this duty without bias or without prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice or public opinion.

I would really be sorry if we could impanel a jury in this great country of ours that didn't have sympathy, but you have sworn to take on a duty as judges of the facts and you must set aside any such factors which have nothing to do with determining innocence or guilt. The Defendants themselves and the public expect that you will carefully and impartially consider all the evidence in the case, follow the laws I give to you and reach a just verdict based on the evidence without regard for the consequences.

Because you may consider only the evidence in this case it is necessary that I delineate for you what is [14,822] evidence and what is not evidence. If inadvertently, or otherwise, any one of you has read or heard anything about this case or any of the witnesses or any of the parties outside of this courtroom, you must completely disregard any such information in reaching your verdict here, and by all means, you must not bring it to the attention of any other juror.

Statements and arguments of counsel are not evidence in the case, unless they are given to you as an admission or stipulation of fact. And that did occur and we told you there were certain facts. I told you that. Certain facts were stipulated. When facts are stipulated, those you must accept. But the arguments and statements of counsel are intended to help you marshall the evidence and intended to assist you, but they, themselves, are not evidence.

The evidence in a case consists of the sworn testimony of the witnesses, that which you hear from the witness stand before the witness steps down, what you hear a witness testify to under oath, all the exhibits which have been received in evidence, all the facts which have been admitted or stipulated and all applicable presumptions which may be stated to you in this charge by the Court.

Any evidence as to which I sustained an objection, and any evidence ordered stricken, must be entirely disregarded by you.

You must disregard it completely, as if [14,823] you never heard it.

The evidence, therefore, consists of any stipulations, the sworn testimony of the witnesses regardless of who may have called them, all exhibits received in evidence regardless of who might have produced them.

You will remember what I told you about questions. Questions are not evidence. It is the answers that are evidence. But, of course, if a person was asked a question which you think he should have been able to answer and he didn't, that may cause you to drawn certain inferences. You may draw inferences from the fact that somebody who should have been able to answer a certain question did not answer it. Whether you do or you don't is for you and not for me. And I again remind you that I am neutral in this case. If I ask questions—and I did ask questions during the course of this trial—and certainly I made comments during the course of the trial—this was for one purpose and one purpose alone, and that is because I wanted things to be firmed up. I wanted to bring out something more firmly or bring up something I felt had not been brought out to my satisfaction for your consideration.

[14,824] The Court. As I say, if I had an opinion as to the innocence or guilt of these defendants, I would be permitted to tell you what it was. I could sum up the evidence and tell you what I think of it and who I think is right and who I think is wrong.

I am not going to do it. I am not going to comment on those kind of things at all. So, if I am not going to do it—if I could do it directly and am not going to do it, I am not going to do it indirectly by raising eyebrows or any of the other things that I have described to you once before.

If from anything I say or said you think I had such an opinion, you shouldn't be concerned with it at all. Any opinion I have isn't important as to the facts. I have nothing to do with deciding the facts or determining the credibility of the witnesses. Those are matters for you and you alone.

And, if through some inadvertence I said something which may erroneously cause you to believe that I had formed such an opinion and wanted to tell it to you, I haven't, and you should disregard it, disregard it totally.

Now, I told you at the beginning of the trial, and I am going to repeat it, because this was a long trial and, you know, nerves

get tight. People get on edge. People sometimes fight about things. People say things. Judges [14,825] do that, too. We are quite human.

I want to say to you, it is the duty of counsel to make objections during the trial. And an attorney, regardless of which side he represents, the Government or a Defendant, would be derelict in his duty if he didn't raise an objection when in his judgment evidence was being offered contrary to law.

It is his opinion as to whether he should make an objection; and when he does, you should not be swayed any way in your judgment of this case by the fact that counsel made an objection or made an argument. And if on occasion I felt that counsel was going a little off the track, if I did that I brought them back on the track, I hope. You must not consider that either in any way in prejudice of any attorney, of course. Or, more importantly, in prejudice of his client.

Realize, if you will, that in a long trial the judge has a duty to keep things moving down the right track as best he can. But don't prejudice anybody from the fact that that happened. Bear in mind that counsel in a trial of this length lose their tempers sometimes, lose their patience sometimes, and the judge then has to sort of get things back in line. But it would be highly unfair for anybody to be prejudiced against a client merely because that happened.

[14,826] Also during the course of the trial you have on occasion been excused while we discussed matters of law which were for the Court to decide. This is a usual and proper procedure. Sometimes we, in a smaller trial with not so many counsel present, we do it in the court at side bar, and that's why we call it a side bar conference. We go over there and talk. But with the number of people in this room, we couldn't do it that way, so you were excused while we did that.

Remember again that you should not be prejudiced in any way or draw any unfavorable inference aginst any party in this case because they asked for a hearing out of the presence of the jury. It wasn't that they were trying to conceal anything from you, or that I was. It was merely that we had something to discuss. If we could anticipate problems in advance we do that, and we pass on them out of your hearing so it won't be necessary for you to be asked to disregard evidence.

If we can, we try to decide that out of your hearing so that if it isn't proper you don't hear it all.

Now I repeat to you, any comment counsel made on the evidence, any comment I might have made, cannot take the place of your recollection. Yours is what counts. You are brought together from all different walks of life and all different experiences in life for the purpose of [14,827] determining the facts. You don't leave your good common sense out in the corridor when you come in here, you bring that right with you. That's what you must use; and it is your recollection that counts.

Now, you were given pads at the beginning of this trial and allowed to take notes. I have given you the opportunity to take notes. Please bear in mind what I told you when we gave you those pads. Those are to refresh your recollection, they are not to show to some other jurors. And if they don't refresh your recollection, then they serve no purpose and you must disregard them. Don't say, "It is true, because I wrote it down." That's not the purpose.

Now, you heard lots of time people on the stand who were shown things and asked if that refreshed their recollection. And you heard me say to them time and again "If looking at that you now remember that was true independently of what is on there, then it has refreshed you recollection. If not, it hasn't, and serves no purpose whatsoever."

And the same thing applies to those pads which I gave to you. Use them for that purpose. And remember, if you will, the little example that I gave you. That if Cain had asked Adam and Eve, "Why were you put out of the Garden of Eden?" And they would have said they don't remember, [14,828] and then somebody would have showed them an apple, and then they said, "Now we remember." It isn't the apple that's any evidence. The apple merely refreshes their recollection. If they look at that apple and it didn't, then it would serve no purpose whatsoever.

And that the notes which you use, as well as the recollection, the things that were used to refresh recollection of jurors, serves that purpose and that alone.

Now, I have told you that you must reach a verdict which is fair and just, and you must do that right regardless of the consequences. And I say to you that the results of a verdict are not your concern. If there is to be a finding of guilty as to any of these Defendants, sentencing is the concern of the Court and the Court alone, and you must not permit yourself

to speculate as to what it will be, or you must not be governed in any way by what you think the result of your action will be. You do what is right. You find the facts from the evidence. You draw such inferences from those facts as you deem appropriate. You then apply the law as I give it to you, to those facts and those inferences, and you reach your verdict as to each of the Defendants in this case independently without any regard for the consequences of it. This is your sworn duty. This is the fabric from which our law is created, our system of justice is created.

[14,829] Now, as I have told you, you are not limited in your consideration to the bald statements of the witnesses. You are not limited solely to what you see or hear.

You must draw from that on occasion certain reasonable inferences which you feel are justified in the light of your experience. Bear in mind, however, that certain evidence was admitted for a limited purpose and not generally. When this was done I instructed you at the time that the evidence was admitted for a limited purpose, and what that limited purpose was.

I instruct you again that such evidence may not be considered by you for any other purpose other than the limited purpose for which it was admitted.

Now, there are certain areas of evidence which I am going to discuss with you. Remember, I told you the facts are for you. You listen to the evidence and you determine the facts. But I think there is certain evidence which I must discuss.

First of all there is the evidence you heard concerning document retention by Celotex. You heard evidence of their policy concerning file retention. This evidence was admitted solely for the purpose of explaining why certain documents were available, if indeed they were not. The evidence shows that Celotex had a policy of retaining certain kinds of documents for a [14,830] specified period of time, and retained certain other documents only for so long as they were needed in the company's business.

The evidence shows that Celotex disposed of certain documents pursuant to its regular procedure under this policy. There is no evidence here that Celotex disposed of any document pursuant to any alleged conspiracy. I therefore instruct you not to reach any conclusion which is unfavorable to Celotex or to any other defendant, based on the evidence that it disposed of certain documents, since the evidence as to that was admitted solely for the purpose of explaining the absence of such documents.

[14,831] Now, certain exhibits in the forms of tables, charts or summaries have been admitted into evidence. There were lots of them. We had little ones and we had blown up ones and we have some that are so big they won't stand on the stand. These tables, charts and summaries were prepared specifically for the purpose of this trial and they were admitted for your assistance and convenience in considering the documentary and detailed evidence which they purport to summarize. They purport to show matters graphically, or in summary form, which are an analysis of a large number of documents or very complicated situations. Their effect, if any, depends upon their accuracy and completeness, upon whether the evidence establishes that the basis claimed for the tables and for summaries formed in your judgment reliable aids to your consideration of the basic evidence. It is for you to examine the basis upon which the tables or summaries rest and to determine whether or not they reflect facts and figures shown by the evidence. You will recall when they were admitted I said on numerous occasions when somebody contended there was some discrepancy, I said, "The document is admitted and that evidence is admitted and it is for the jury to consider, having heard that, what effect it might have on the chart or summary."

I repeat that now. You must determine what, if any weight should be given to any chart, any summary or any [14,832] document and you must do that on the basis that I have just tried to outline to you.

Now, you also heard certain expert testimony. Experts are people who have by virtue of their training and experience certain knowledge in a particular field. Ordinarily a witness may not testify as to his opinions or conclusions. He may only testify to facts, things he saw, things he heard. An expert is an exception to this rule. He is permitted to give his opinion or state his conclusions on matters which are in issue in the case, based on his expertise and the studies he may have made of factors he believed relevant in reaching his conclusions. This is normally permitted as to matters which are not within the knowledge of we who are laymen on the particular subject. I suppose

the best example—and it is in no way relevant here—is a doctor may take the witness stand and under oath testify as to his opinion concerning the condition of certain persons. You can understand why that would be. We who are not doctors would not be able to reach a conclusion from the evidence itself, so we permit the doctor to express an opinion on it. Remember, he doesn't vouch for the fact. He only vouches for the opinion he gave based on the facts which you know and he only vouches this is his honest, conscientious opinion on the subject.

The testimony of experts is intended only to [14,833] assist you as one factor which you should consider in arriving at the ultimate decision of guilt or innocence, based on all the evidence before you. Although an expert may be qualified to express an opinion and testify to it, you, the jurors, are the real experts in determining the guilt or innocence of the Defendants here at trial. An expert can express an opinion on it and you can consider that opinion, give it such weight as you deem appropriate, but you are the sole determiners of the fact.

The opinions of experts are in no way binding on you. You are free to accept them or reject them in whole or in part. The weight and credit, if any, that you will give to an expert's opinion will depend upon your impression of the expert and the method and procedures he employed in arriving at his opinion.

You should consider whether he prepared, if he prepared charts and tables, or if they were prepared under his supervision, they were accurate and completely reflected the underlying data. You should also determine whether the reasons and explanations the expert gave in support of his opinion and conclusions were reasonable.

As with other witnesses, you should also consider whether or not the expert had any bias or lack of bias, any interest in the outcome of the case, and whether there were any inconsistencies and contradictions in his testimony that [14,834] you may or may not find.

Now during the course of this trial counsel on occasion has read to you from Grand Jury transcripts or prior testimony given on some other case. This was done for two purposes. Sometimes it was done to refresh recollection and other times for the purpose of impeaching credibility. In other words, by

impeaching credibility I mean it was done for the purpose of causing you not to believe the testimony of that particular witness, except in the instance in which the Grand Jury testimony of Mr. Melvin Quayle was given. That is a little different. He is deceased. That was read to you in connection with certain aspects of Mr. Huckleberry's testimony.

Now, material read from a Grand Jury transcript or any other transcript of prior testimony under oath which was used to refresh recollection has no purpose other than that. It either did refresh recollection or it didn't. If it didn't, it has no value. If it did, then you consider the testimony itself rather than the matter that was read. If it was given to you for impeachment purposes, then it is for you to decide the effect which that might have on any witness's credibility.

In other words, somebody testified to something and they say didn't you testify differently on a prior occasion, and they read it to you. Now then you have to [14,835] decide from hearing the prior testimony and hearing the present testimony, whether this has the effect of impeaching the credibility of that witness. Does that make him less believable in your mind than he would have been, if you had known he had testified that way?

Evidence has been presented in this trial regarding the activities of an association, a trade association known as the Gypsum Association. I want you to know it is perfectly lawful for any company or any person to be a member of one or more trade associations or to participate in their meetings or any other activity, including the activities of the committees of the trade association.

A trade association such as the Gypsum Association may legally educate its members in the proper conduct of their business. There is nothing illegal or improper if the purpose or result in such an educational program is to convince another individual or a company that the practices advocated by the association are more sound than the prevailing practices in the industry.

Now I will explain this a little further later.

Proof of a conspiracy does not necessarily require proof of an expressed formal agreement or proof that the alleged conspirators had any face-to-face meeting at all. I am fond of saying that conspiracies are not normally formed on the court-

house steps, they are not done by written [14,836] contracts or oral contracts. And there you are.

You must bear in mind that meetings between or among competitors at Gypsum Association meetings, or elsewhere, may supply an opportunity to make either lawful agreements or unlawful agreements. Such opportunity evidence, of course, does not establish that an agreement of any kind was discussed or entered into at such meetings. Therefore, the evidence of such meetings and the opportunity evidence could not have itself established the existence of an unlawful conspiracy.

[14,837] The COURT. In weighing the significance and the meaning of meetings in this case, whether at the Gypsum Association or at breakfast in somebody's club, or at some resort, or at the airport by inadvertence or not by inadvertence, you must consider the extent to which you heard the legitimate purpose of the meetings. The events that came before the meetings, the events that came after the meetings, and the extent to which the conduct of the companies involved remained the same or changed in the times either just before or just after such meetings.

Thus, opportunity evidence is merely one or part of the circumstances which you must take into consideration along with all other evidence offered in the case.

Now, there are two kinds of evidence, direct and circumstantial evidence. And in these days when trials are so popular as a part of the television shows, I am sure that you have heard the ringing statement about whether something was circumstantial evidence or wasn't circumstantial evidence.

Let me explain what we mean by direct evidence and what we mean by circumstantial evidence.

Direct evidence is evidence which directly establishes the existence of a fact. A witness says he knows it to his own knowledge because he saw it, he heard it, he tasted it, he felt it, or he smelled it. He knows [14,838] this to his own knowledge.

For example, if a man looks out his window in the backyard and he sees a rabbit, and he says to his wife, "There is a rabbit in the back yard." That's direct evidence.

Suppose on the other hand—let me tell you what circumstantial evidence is. Circumstantial evidence is evidence of certain facts from which you, the jurors may infer certain other connected facts which usually and reasonably follow in accordance with the common experience of mankind.

Now, suppose that fellow looks out the window and there on the new-fallen snow he sees tracks. And he says to his wife, "There was a rabbit in the back yard." Because he saw the rabbit tracks. That's not direct evidence, that's circumstantial evidence.

Now let's look at this for a moment.

Suppose the man who looked out the window has such bad eyesight that he can hardly see very far. How good is his direct evidence that there was a rabbit in the back yard? Suppose the man who saw the rabbit tracks was a great expert on wildlife, and he saw those tracks, and he is a pretty good judge on whether or not they are rabbit tracks. In that kind of circumstance, as you can see, circumstantial evidence can be better than direct evidence.

[14,839] So, I charged you that whether evidence is circumstantial evidence or direct evidence, either one standing by itself alone or in combination with the other can be enough to sustain a verdict if you are satisfied by that evidence beyond a reasonable doubt.

You understand what I mean. Either circumstantial evidence, direct evidence, or a combination of the two. If it satisfies you beyond a reasonable doubt—as I will charge you later—of the guilt of any Defendant, that is sufficient to sustain the verdict.

Now, the burden is always on the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a Defendant. The law never imposes upon a Defendant in a criminal case, the burden or duty of calling witnesses or producing evidence, the burden is on the prosecution.

A reasonable doubt exists when, after careful and impartial consideration of all the evidence in the case, the jurors do not feel convinced to a moral certainty that a Defendant is guilty of the charge. Therefore, if you view the evidence in the case as reasonably permitting either of two conclusions, the one of innocence, or the other of guilt, then you must adopt the conclusion of innocence.

Now, that doesn't mean a reasonable doubt is not [14,840] a doubt that somebody conjures up in his own mind to avoid doing an unpleasant duty. It is the kind of a doubt that I had defined to you.

Remember, of course, that the indictment is not evidence, it is only the formal method of accusing a person of a crime. It

is the charges in the indictment which must be proved by the evidence beyond a reasonable doubt.

The law presumes every Defendant to be innocent of crime. Thus a Defendant, although accused by indictment, begins a trial with a clean slate, with no evidence with him. And that law remains with him, and that presumption remains with him until you are satisfied by the evidence of his guilt beyond a reasonable doubt.

The law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So, the presumption of innocence alone is sufficient to acquit a defendant unless the jury is satisfied beyond a reasonable doubt of that defendant's guilt as charged after careful and impartial consideration of all evidence in the case.

Now, it isn't required that the prosecutor prove guilt beyond all possible doubt. That could often not be done. That would often be impossible. I think I told you preliminarily that some people are in doubt as to whether 2 and 2 is 4. So, the test is reasonable doubt, not all [14,841] possible doubt.

A reasonable doubt is a doubt based on reason and common sense, the kind of doubt that would make a reasonable person hesitate to act in a matter of importance to themselves. It is such a matter as you would be willing to rely on in such a matter in your own lives if it were important to you.

You must remember that no one is ever convicted upon mere suspicion or conjecture. And I have told you before—and I am going to repeat—you are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You must carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief.

Consider the witness' intelligence, his motives and state of mind, demeanor and manner while on the stand. Did he impress you as being someone who was testifying openly and frankly; or did he appear to you to be somebody that was evasive and playing games and not being truthful with you?

Consider the witness' ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters.

[14,842] Bear in mind the relationship that any witness may have to either side in the case, the manner in which he might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit some testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently. An innocent misrecollection, like a failure of recollection, is not an uncommon experience.

Think back three Mondays ago about what you had for dinner. And the fact that you can't recollect that does not necessarily mean that you don't want to tell somebody what you had for dinner. There can be an innocent failure of recollection.

And let's suppose for a minute you say, "Oh, I remember. I had liver and onions." And you didn't have liver and onions, you had stew. This can be an innocent misrecollection. See, those things happen, and it doesn't necessarily mean that somebody isn't telling the truth.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

[14,843] In arguing this case to you counsel have commented on the facts, they have argued to you what they think you should find from the testimony and from the exhibits, and they have argued to you what inferences they think you should draw. Remember, it is your recollection and yours alone that counts, and you will determine what weight you wish to give to the testimony of each of the particular witnesses, and indeed to the testimony itself.

[14,844] The Court: Now, you know sometimes there appears to be a conflict between what a person said one time and what he said at another time or what two different people said. You must first attempt to analyze and harmonize the evidence, because sometimes what appears to be a conflict isn't and they can be harmonized. If there are conflicts in evidence which cannot be harmonized, then you must determine which is factual and which is not.

You will recall the evidence. You have heard it. You have notes to refresh your recollection, if they do it. I am not going to review the testimony in this case in any detail at all. I may do it to a certain extent to point up the contentions of the parties, but not beyond that. The reason for that is this: If I attempted to do that, I might overemphasize one point and overestimate something else. I couldn't possibly go over the testimony of all the witnesses through a four-month trial, unless we were to have a four-month charge, and I don't intend—I am not going to do that. I therefore leave the recollection of the testimony entirely in the hands of you, the jurors, who must determine what the facts are.

Now you have heard during the case that there are certain corporations and individuals who are not on trial here before you. You must not speculate as to why not or infer any reason why any other corporation, association or [14,845] individual concerning whom you have heard evidence during this trial is not on trial here. This must not be given any weight in even the slightest degree by you for or against the prosecution or for or against the Defendants who are now on trial. Just don't concern yourself with that matter at all.

Now I want to charge you at this time that it is your duty to give separate consideration to the charges against each of the Defendants, whether they were a corporation or an individual. Each must be passed upon by you separately. You may find all of the Defendants guilty. You may find all of the Defendants not guilty or you may find some guilty and some not guilty. This depends on the facts as you find them and the inferences which you deem appropriate to draw from those charges.

Now it is charged in the indictment that beginning somewhere prior to 1960 and continuing thereafter until at least sometime in 1973, the exact date being to the Grand Jurors unknown, the Defendants and co-conspirators who are not Defendants engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in the manufacture and sale of gypsum board; that this conspiracy consisted of a continuing agreement, understanding and concept of action among the Defendants and co-conspirators to raise, fix, maintain and stabilize the prices of gypsum [14,846] board, to fix, maintain and stabilize terms and conditions of sale thereof and to adopt and maintain uniform methods of packaging and handling such gypsum board, all allegedly in violation of Section I Title XV of the United States Code, commonly known as the Sherman Act.

To raise means to move to a higher level. I think we all know what they mean by raising prices. That is to raise them to a higher level. To fix, in that sense that we are using it, means to arrange, establish or prescribe.

Fixed prices are agreed upon prices. They are not necessarily uniform. It is illegal to agree to fix prices, whether you fix them uniformly or not.

To maintain means to support or sustain.

To stabilize means to keep steady, as distinguished from fluctuating.

Bear in mind the detailed, cautionary instructions I will be giving to you, proof of an agreement to do any one of these, that is to fix, to raise, to maintain or stabilize the price or terms and conditions of sale of gypsum wallboard would be sufficient to sustain a conviction under this indictment.

In formulating and effectuating the aforesaid combination and conspiracy, the indictment charges that the Defendants and co-conspirators did, among other things, [14,847] the following:

A, agreed to raise the prices of gypsum board.

B, agreed to the terms and the conditions of sale of gypsum board.

C, published price lists and terms and conditions of sale in accordance with the agreements reached.

D, agreed to maintain published prices and conditions of sale of gypsum board.

E, agreed to maintain job price protection lists and to discuss and exchange data set forth therein in order to insure the maintenance of published prices of gypsum board.

F, agreed at meetings of the Gypsum Association, over the telephone, by mail, to adopt uniform methods of packaging or handling gypsum board.

G, agreed to adopt uniform methods of delivery of gypsum board.

H, telephoned or otherwise contacted one another to exchange and discuss current and future published or market

prices and published or standard terms and conditions of sale and to ascertain alleged deviations therefrom.

I, telephoned or otherwise contacted one another to ascertain alleged deviations from other uniform practices and policies concerning sale of gypsum board, including, but not limited to, job price protection, boundaries of [14,848] price zones, methods of delivery, points of delivery and packaging and handling.

J, agreed not to undercut gypsum board prices which were ascertained from one another as the actual selling or offered prices to purchasers of gypsum board.

K, agreed not to give a greater cash discounts or more generous terms of sale than those ascertained from one another as the discounts or terms being granted or offered to purchasers of gypsum board.

L, agreed not to deviate from standard uniform practices and policies in the sale of gypsum board, except to the extent deviations from such practices and policies were ascertained from one another.

M, engaged in predatory practices designed to eliminate or otherwise contain the competition generated from time to time by certain producers of gypsum board.

Now we have gone for about an hour and I think it might be an appropriate occasion to take a ten-minute recess.

[Brief recess.]

[14,849] The COURT. Now, the indictment which I read to you—I told you what was in it—alleges some 13 means and methods by which the Defendant and others are claimed to have formulated and effectuated the combination and conspiracy.

The Government is not required to prove all 13 means and methods were agreed upon to carry out the alleged conspiracy, nor need it prove that all 13 were actually used or put into operation.

Even if you should find that the alleged conspirators or some of them took most or all of the actions characterized in the indictment as methods or means, this alone would not justify a conviction, unless you find that one or more of such actions were taken within the statutory period, pursuant to and for purposes of effectuating the conspiracy charged in the indictment.

The core of the matter is the alleged conspiracy. And the question under the ways and means section of the indictment is whether any or all of these actions were taken because of and for the objectives of such a conspiracy.

Instead of going through each of these alleged means and methods, one by one, I have grouped them into categories.

If I said "matter and means," I meant means and [14,850] methods. I have grouped them into categories. After summarizing each category, I will give you some instructions on the legal principles applicable to each and on some of the factors you should consider in applying them.

The first four of these means or methods relate to the prices and materials and conditions of sale of gypsum board.

In summary, they allege that the Defendants and other coconspirators agreed to increase the price of gypsum board and agreed to the terms and conditions of the sales, that they published price lists in conformity with these alleged agreements, and agreed to maintain the published prices and terms.

As with the basic charge in the indictment, the central and controlling element here is the element of agreement. It is not a violation of the Sherman Act for competitors to adopt substantially similar or even identical prices or terms of sale of another competitor, unless that is done pursuant to an agreement such as the indictment charges in this case.

I guess I could sum it up by saying Macy's can't tell Gimbel's; but, if Macy's wants to follow Gimbel's and charge the same prices Gimbel's do, there is nothing wrong with that, unless there is an agreement to do that. The agreement is the crux of the violation. Identical [14,851] prices or price changes among competitors are not, in themselves, sufficient proof of conspiracy.

Such an identity commonly results from the forces of supply and demand operating upon independent sellers in the market. This is particularly so where goods are fungible; that is, one kind of goods is exactly the same as some other kind of goods. A product where both elements are the same or a product doesn't differ from company to company couldn't sell if they didn't sell at the same price. So the law of supply and demand requires that.

However, that is not an offense unless there is a conspiracy to do that.

The Sherman Act is not violated if the ordinary forces in the market of competition make prices the same.

I suppose—I don't know, but I suppose that everybody charges the same for chewing gum; one pack of chewing gum, let's say, costs the same as another pack of chewing gum. Nothing wrong with that, unless the manufacturers of chewing gum get together and say, "Let's charge the same price." They don't have to get together and do it. They can have an agreement by implication, as well as by express language.

There can be expressed agreements, or there can be implied agreements, and agreements can be implied from the nature of conduct, as well as from the words actually used.

[14,852] Uniform prices, however, whether list prices or transaction prices, particularly where they appear to be unrelated to supply and demand or to other economic factors, may be considered by you as some evidence from which an agreement or understanding to restrain trade may be inferred.

The next asserted means and methods in the indictment refers to job protection. It asserts that the alleged conspirators agreed to maintain job price protection lists and to discuss and exchange data set forth therein, in order to insure the maintenance of published prices of gypsum board.

The Defendants have asserted that such exchanges of information with respect to alleged offerings of alleged job price protection were made in order to prevent them from being defrauded by certain of their customers, who claimed untruthfully that a competitor had offered job price protection when he had not.

The Government charges that the preparation, use, and exchange of job price protection lists was pursuant to an agreement to raise, fix, maintain, and stabilize prices.

The question is one for you and you alone to determine, under all the facts and circumstances, in accordance with the law, as I gave you. You must determine what was the purpose of the job protection list. Was it [14,853] for the purpose that the Defendants state, to avoid somebody telling them that there was job protection when there was not, and thus to work a fraud on them? Or was it for the purpose the Government states, to raise, fix, maintain, and stabilize prices in this manner?

This is a question that you are going to have to decide from all the evidence in the case.

The next group of means and methods asserts, in substance, that the Defendants and alleged co-conspirators exchanged price and other competitive information with each other and that the information was given and received in order to raise, fix, maintain, and stabilize list prices in the gypsum industry.

As I understand the situation—again, this is for you and not for me—but, as I understand it, the Defendants do not dispute the fact that they did exchange price and other competitive information among themselves and with each other and with others. However, they say there was no agreement to do so, and they say that the purpose of such exchange of competitive information, which they call verification, was not to fix, raise, maintain, and stabilize prices, in violation of the Sherman Act, but, rather, they claim the purpose was solely to insure their compliance with another antitrust law known as the Robinson-Patman Act.

Now, you have heard a good bit about the Robinson-[14,854] Patman Act in this case. However, in order for you to be able to assess the opposing contentions of the parties and the evidence you have heard on this case, I am going to restate parts of that act to you. I will then explain what the provisions of the law mean for the purposes of this case and how you are to weigh and consider the evidence relating to this document.

So far as it concerns us here, the Robinson-Patman Act provides that it is unlawful for the seller of a commodity to discriminate in price between different purchasers of that commodity, where the effect of such discrimination may be substantially to lessen competition or to injure, destroy, or prevent competition with customers of the seller who grants the discrimination in price.

What this means is that, where a seller has two customers which compete in the same market—for example, two lumber yards in the same vicinity—the seller may not sell to one of them at a lower price than it sells to the other, for the effect of such price discrimination would be to tend to injure the unfavored customer in his efforts to compete with the favored customer.

The Robinson-Patman Act does provide certain justifications or defenses which are available to a seller who chooses to discriminate in price between two of its competing customers.

[14.855] Among these is the good faith meeting of competition defense. If a seller chooses to discriminate in price between two of his customers and is then charged with violating the Robinson-Patman Act, that act provides that he may defend against this charge, and I quote, "By showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price to a competitor, or the services or facilities furnished by a competitor."

What this means is that a seller's lower price to one of his customers in the market is not a violation of the Robinson-Patman Act if the seller can show that he charged that lower price because he believed, in good faith, that one of his competitors had charged or offered that lower price to that particular customer.

Now, the act does not specify any particular method a seller must use to establish his good faith in charging a lower price to a customer in order to meet a competitor's price.

What the law does require of such a seller is that he have facts available to him, at the time, which would lead a reasonable and prudent person to believe that the lower competitive price existed.

The Defendants contend that they exchanged such information or verified solely for the purposes of insuring [14.856] that, if they made a sale at a lower price to a particular customer to meet the reported lower price or offer of a competitor, they would be able to establish that the—if the question were ever raised—their good faith in lowering their price to that customer.

The Government contends, on the contrary, that the Defendants and the others—and others engaged in this practice pursuant to an agreement, mutual understanding.

The Government asserts that the Defendants' purpose was not merely to establish their good faith under the Robinson-Patman Act, but that they exchanged competitive information for the purpose of raising, fixing, maintaining, and stabilizing prices.

It will be up to you, members of the jury, to resolve these issues.

First, you must determine whether there was an agreement, either implied or express, to engage in the practice of price

checking or verification. In other words, you will have to decide whether, if one person called the other and asked about prices, and that one told him and then the other then called back, and the same thing resulted—whether or not that amounts to an implied agreement to do just that, to tell each other whether or not the price that they were informed had been offered was, in fact offered. Does this constitute, in effect, an implied agreement to [14.857] do that?

Now, what is an implied agreement?

We all make those, every day of our life, all the time. Somebody comes and offers you a certain service, and you say, "Go ahead and do it;" and then he comes and tells you the price—he might have told you the price first, or he might not. You may have said, "Yes, I agree with you, you should perform the services, and I will pay you for doing it." This is an implied sort of thing. So, if a young man comes up and says he wants to cut your grass, and you say, "Go ahead," there is an implied agreement. Now, you have agreed, in effect, that he should cut your grass, and there is an implied agreement, then, that you are going to pay him for it.

So you have to decide, did that happen here or didn't it?

In deciding this issue, you must follow the instructions concerning what the Government must prove to establish the existence of a mutual understanding or agreement between or among competitors.

Secondly, you must determine whether the purpose for the exchange of competitive information between the Defendants and their alleged co-conspirators was to insure a good faith meeting of competition, as a defense to the Robinson-Patman Act.

[14.858] If you decide that, if you decide this was merely done in a good faith effort to comply with the Robinson-Patman Act, then you could not consider verification, standing alone, as establishing an agreement to fix, raise, maintain, and stabilize prices as charged.

However, if you decide that the effect of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these changes as evidence of the mutual agreement or understanding alleged in the indictment to raise, fix, maintain, and stabilize list prices.

As I will explain to you in greater detail, if you find that the purpose of an agreement to exchange price information was

to raise, fix, and maintain or stabilize prices, then it does not matter whether or not the agreement was successful.

You see, a conspiracy to fix prices doesn't have to be successful to be unlawful, if there was such a thing. If the effect of such exchanges was to raise, fix, maintain or stabilize prices, then an agreement to engage in such an exchange is a violation of the Sherman Act, regardless of the specific purpose that the parties to the agreement had in their minds. That is because the Sherman Act does not require proof of a specific purpose to restrain trade in order to establish the offense.

[14,859] The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.

Another group of means and methods relating to the elimination or curtailment of certain methods of packaging and handling of gypsum board by the alleged conspirator companies—this is another group of means and methods which is charged for you.

As I have already instructed you, there is nothing illegal in the Defendants having identical conditions of sale, such as shipping wallboard on pallets or not shipping wallboard on pallets; nor is it illegal for one Defendant to stop shipping on pallets and then for the others to stop using them. Absent an agreement to do so, for the purpose and absent an agreement to do so, which has the effect of raising, fixing, maintaining, and stabilizing prices, such facts would not constitute—would not establish a conspiracy in violation of the Sherman Act as charged.

If you should find that an agreement on the methods of material handling did exist, and continued after December 27, 1968, nevertheless, you may not convict a Defendant unless you further find that the effect of that [14,860] agreement was to raise, fix, maintain, and stabilize prices of gypsum board.

Standing alone, a mere agreement on materials handling—for example, an agreement to eliminate pallets—even if the effect of it was to increase the profits of the agreeing Defendant, is not illegal, unless you find that such agreement went beyond materials handling and had the further purpose and effect of raising, fixing, maintaining, or stabilizing the price of gypsum board.

Therefore, if any agreement concerning materials handling prices did not have that effect, it must be disregarded and could not be considered.

Now, you heard the evidence on this matter. You heard the arguments of counsel on this matter. You have to decide, was there such an agreement, and, if so, did it have the effect of raising, fixing, maintaining, and stabilizing prices?

That is the decision which must be reached in regard to material handling.

I say, a mere agreement to eliminate pallets or sleuters or whatever it is we were talking about is not a violation, unless it had the effect of raising, fixing, maintaining, and stabilizing prices and there was an agreement to do the thing that was done—to eliminate the pallets, for example..

[14,861] Another means and method the indictment mentions is the charge that the alleged conspirators engaged in predatory conduct.

Now, predatory conduct, as we use it here, is conduct designed to eliminate or curtail the competition of others.

In this case, we are considering, in that regard, the competition generated by single—by certain single-plant producers.

Now, what is it we are talking about by this? "Predatory" is a harsh word. I guess the word itself means something like you go out and eat people or something. I don't know; but that is not what we are talking about here.

The charge of the Government, as I understand it, is that there were certain—remember, it is your understanding that counts, not mine. As I understand what they are saying, they are saying that, insofar as the certain single-plant producers were concerned, the Defendants, by agreement, adopted means to either make them get into line or put them out of business. That is the charge, as I understand it.

Now, you have to understand that the word, "predatory," is a conclusory sort of word, and it doesn't prove that anybody's conduct in this case was, in fact, predatory. Merely calling it the name doesn't do it. You must assess the facts and make that sort of a conclusion [14,862] if you find that the evidence warrants it.

The evidence of the predatory conduct, you will recall, relates primarily to alleged conduct agreed upon toward and directed toward the Texas Gypsum Company and the Republic Gypsum Company.

In assessing the evidence relating to this topic, remember that competitors are supposed to compete; and no competitor whether it is a single- or multi-plant producer, a newcomer or an oldtimer, can rightfully expect that he can sell his products without others in the same business competing with him for sales.

On the other hand, competitive efforts directed or focused against specific companies may be evidence that the alleged conspirators were seeking to fix, raise, maintain and stabilize prices by curtailing or limiting the competition of those companies.

Consider, on this question, the extent to which the single-plant producers appeared to depart from or conform to the normal practices and policies of the industry.

Consider the evidence concerning the levels of prices in the market in which the single-plant producers operated and the levels of prices in other markets.

Attempt to determine whether any differences you find in these price levels are attributable to different conditions in the various markets, including such factors as [14,863] cost, demand, supply, the number of competitors in a given market, and any other factors which might naturally bear on or influence price levels in the particular markets.

Ask yourselves whether any price moves by the Defendants in the primary markets of the single-plant producers appear, from the evidence, to have been made on a selective basis, bearing in mind that there is nothing intrinsically illegal about charging different prices in different markets.

As usual, and as I have been reminding you on each of these claims, means and methods, the question for you to determine is whether the evidence you have heard respecting the single-plant producers reflects the existence of the conspiracy, the absence of the conspiracy, or nothing either way.

Now, I must comment, of course, on the Statute of Limitations, because you heard a good bit about that, too.

You will note that the indictment charges that the alleged conspiracy existed from on or about a certain time until on or about a certain time. The evidence in the case need not establish the exact time during which the conspiracy existed. It is sufficient if the evidence in the case shows beyond a reasonable doubt that the offense was committed on dates or during times

reasonably near the dates or times alleged in the indictment. [14,864] However, this does not mean that specific dates need be of no concern to you. The statute of Limitations for the offense charged in the indictment is five years. This means that you cannot find any of these Defendants guilty unless you find beyond a reasonable doubt that a conspiracy continued or existed within the period beginning December 27, 1968, and ending December 27, 1973. The 1973 date is the date that the indictment was filed.

Now, there is no requirement that it existed during that entire period. If this—if you were satisfied beyond a reasonable doubt that this conspiracy continued and existed at some time after December 27, 1968, that would be sufficient. Of course, if it existed after the indictment was returned on December 27, 1973, that would be an irrelevant matter.

Of course, if you heard that it existed after that date, that might have some weight in your consideration as to whether or not it continued and existed into the statutory period.

This does not mean, however, that you must exclude from consideration evidence of acts or conduct prior to December 27, 1968. A conspiracy may be a continuing thing, which may be proved by a composite of acts. Therefore, you may consider evidence of Defendants' conduct prior to December 27, 1968, insofar as it may tend to prove a design or intent or pattern with respect to their conduct after [14,865] December 27, 1968, or to show the formation of a conspiracy prior to that date which continued thereafter into what has been referred to as the statutory period.

You must clearly understand the purpose for which evidence of a Defendant's pre-statutory activities were admitted.

The Government has alleged a conspiracy which began before December 27, 1968, and continued after that date.

The Government was entitled to prove when, if ever, the alleged conspiracy began and what its purpose was, but I caution you that you must consider such early acts in reaching your verdict only if you find that there was proof beyond a reasonable doubt that the conspiracy charged was in existence after December 27, 1968.

If you do find beyond a reasonable doubt that a conspiracy existed that one or all of the Defendants knowingly joined it and that the agreement contemplated a continuing plan or

scheme to raise, fix, maintain, and stabilize prices, then, in order to find that the conspiracy existed after December 27, 1968, you must find that one or more of the members of that conspiracy performed an act after that date to further the objectives of that conspiracy.

In considering this question, you must first [14,866] determine the scope of the understanding, if any, that existed prior to December 27, 1968; that is, whether the agreement covered or embraced prices or terms and conditions or both.

Secondly, you must determine the parties who joined or participated in that agreement or understanding, if any did.

And, third, you must determine whether any of these parties performed an act after December 27, 1968, to further the objectives or purposes of the agreement which you found existed prior to that date.

Of course, if you found it was first formed after December 27, 1968, that would be also sufficient if—but I don't think there is any charge here that it was formed orginally after that date.

That, again is for your determination.

Now, in order for you to find beyond a reasonable doubt that the agreement continued beyond December 27, 1968, you need not find the agreement previously entered nnto was renewed or reaffirmed by each of the members after that date.

The law is that if there is a conspiracy to do an unlawful thing which has a continuing purpose or objective, it is considered to continue whenever one member of the conspiracy does some act in furtherance of the conspiracy.

[14,867] On the subject of specific dates, I remind you that it is stipulated in this case that Georgia-Pacific acquired Bestwall Gypsum Company and entered the gypsum business in April of 1965.

As with each and every Defendant, there must be proof beyond a reasonable doubt that Georgia-Pacific joined the conspiracy.

Should you find that one existed before, you may convict. However, as to Defendant Georgia-Pacific, such proof of joinder must be as to events after April of 1965, because Georgia-Pacific could not have joined an alleged conspiracy before they were in the wallboard business.

Now, Section 1 of the Sherman Antitrust Act provides, insofar as it is here pertinent, as follows:

"Every contract, combination, or conspiracy in restraint of trade among the several states is declared to be illegal. Every person who shall make any contract or engage in any conspiracy declared by Sections 1 to 7 of this title to be illegal shall be guilty of an offense against the laws of the United States."

The antitrust laws of the United States are intended to preserve the free flow of commerce and trade among the states and to secure to everyone an equal right and opportunity to engage in such trade or commerce. Thus, any unreasonable [14,868] interference by means of contract, combination, or conspiracy with the ordinary and freely competitive pricing and distribution system of the open market constitutes an unreasonable restraint of trade and is, in and of itself, unlawful, and, if it be knowingly done, is a Federal offense under the Sherman Antitrust Act.

Ladies and gentlemen, remember, our economy is based on a free enterprise system. Such a system is totally dependent upon the use of competition, and, without competition, free enterprise cannot exist. The alternative to that is control by a monolithic bureaucracy.

If free enterprise is to actually control the rate at which goods are exchanged, it must not be interfered with by agreement to raise, fix, maintain and stabilize prices.

[14,869] Such agreements tend to produce rigid controls, which lead, eventually, to the demise of the free enterprise system. The free enterprise system may not be constitutionally guaranteed, as is, for example, freedom of religion and the press, speech or assembly; however, I believe that free enterprise, in the full sense, is the best control we have on economic excess—It frees the spirit and loosens men's creative energies. It is for these reasons that I believe the charge of raising, fixing, maintaining and stabilizing prices is a most serious one, and must be seriously considered by you.

Now, the Sherman Act is not applicable unless it is first established that the alleged unreasonable restraint occurred within the flow of interstate commerce or substantially affected interstate commerce. The term "interstate commerce," denotes transactions of commodities which moves across state lines. The statutory requirement that interstate commerce be involved is not an issue in this case. Counsel have stipulated that substantial quantities of gypsum board were sold by the

Defendants in interstate commerce. However, the jurisdictional requirements of the Sherman Act remains in effect.

In order to find any individual or corporate Defendant guilty as charged, you must find, based on evidence which convinces you beyond a reasonable doubt, that some [14,870] means, method or practices were employed within the Western District of Pennsylvania by or under the authority of the Defendants, members of the alleged conspiracy, at some time after December 27, 1968. This element of the offense would be established, assuming, for the purpose of explaining, if you had found the charged price fixing to exist, if you found, thereafter, that one or more of the members of the conspiracy published price lists or sold wallboard witnin this district within the statutory period and that such prices or offers to sell reflected illegally agreed upon prices, terms or conditions of sale.

Now, a conspiracy is a combination of two or more persons to accomplish an unlawful purpose by concerted action or to accomplish a lawful purpose by unlawful means. A conspiracy is a partnership for a criminal purpose—in this case, the purpose alleged is restraint of interstate commerce—in which each member becomes the agent of each other member. The gist of the offense is the combination or agreement to disobey or disregard the law. In this context and also in regard to the language of the Sherman Act, itself, I remind you that a corporation is a person in the eyes of the law. Thus, when I use the word, 'person,' I am using it interchangeably, to mean either an individual or a corporate entity.

Mere similarity of conduct amongst the various [14,871] persons and the fact they may have associated with each other and may have assembled together to discuss common aims and interests does not necessarily establish the existence of a conspiracy. On the other hand, the evidence in the case need not show the members entered into any expressed or formal agreement or that they directly, by spoken word or writing, stated amongst themselves what their purpose was to be or the details thereof or the means by which the object or purpose was to be accomplished.

What the evidence must show, in order to establish proof that a conspiracy existed is that the members, in some way or manner, positively or tacitly came to a mutual understanding to try to accomplish a common, unlawful plan. The evi-

dence in the case need not establish that all the means or methods set forth in the indictment are agreed upon to carry out the alleged conspiracy, nor that all means or methods were agreed upon which were—that all means and methods that were agreed upon were actually used or put into operation, nor that all the persons charged to have been members of the conspiracy were such. What the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed and that one or more of the means or methods described in the indictment were agreed upon to be used in an effort to accomplish the same object or purpose of the conspiracy as charged in [14,872] the indictment, that two or more persons, including one or more of the Defendants, were knowing members of the conspiracy. One may become a member of a conspiracy without having full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy at all but happens to act in a way which furthers some object or purpose thereof does not, thereby, become a conspirator.

Before the jury may find that a defendant or any other person has become a member of a conspiracy, evidence in the case must show, beyond a reasonable doubt, that the conspiracy was knowingly formed and that the defendant or other person who is claimed to have been a member knowingly participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy. To act or participate knowingly means to act or participate voluntarily and intentionally and not because of mistake or accident or other innocent reason, so, if a defendant or any other person, understanding the unlawful character of a plan, intentionally encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he, therefore, becomes a knowing participant, a conspirator. One who knowingly joins a conspiracy already existing is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

[14,873] An individual's membership in a conspiracy must be established by evidence as to his own conduct, what he, himself, knowingly said or did.

In your consideration of the evidence in the case as to the offense of conspiracy charged, you should first determine

whether or not the conspiracy existed as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not any of the Defendants, here, knowingly became members of that conspiracy. Whenever it appears, beyond a reasonable doubt, from the evidence in the case, that a conspiracy existed and that a Defendant was one of the members, then the statements and acts by any person likewise found to be a member might be considered by the jury as evidence in the case as to the Defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the Defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy. Otherwise, an admission or incriminatory statement made or acts done outside of the court by one person may not be considered as evidence in the case against any other person who was not present and heard the statement made and saw the act done.

If it appears beyond a reasonable doubt, from the [14,874] evidence in the case, that the conspiracy alleged in the indictment was knowingly formed and that any Defendant knowingly became a member of the conspiracy, either at the inception of the plan or scheme or afterward, then the success or failure of the conspiracy to accomplish the common purpose or object is immaterial.

Because express agreements are neither necessary nor common in establishing unlawful conspiracies, the crime is one which may be shown from circumstantial evidence, such as through a course of conduct or business dealings. In other words, whether the prosecutor has sustained its burden of proving a conspiracy must be frequently judged by what the jury finds the parties actually did, rather than from the words they used.

[14,875] The Court: The unlawful agreement may be shown if the proof establishes a concert of action, with all the parties working together, understandably, through a single design for the accomplishment of a common purpose. It is not essential to such a showing that all the parties should have acted exactly alike, nor is it a defense if a party is found to have been forced by economic or other pressures to join in the concert.

Acquiescence and participation in the illegal scheme are as much a violation of the Sherman Act as the creation and promotion of one.

However, it is the Government's burden to show such acquiescence and participation is a matter of conscious choice beyond reasonable doubt. It is not enough to show the parties acted uniformly or similarly or in any way that may seem to be mutually beneficial. If such actions were taken independently, as a matter of individual business judgment, without any agreement or arrangement or understanding among the parties, then there would be no conspiracy, even though the separate and independent actions were substantially concurrent and tended toward the accomplishment of similar objectives separately pursued by individual parties.

Thus, similarities of competitive business practices of the accused or the mere fact that they may have adopted [14,876] identical prices and terms or conditions of sale or packaging or handling does not, by itself, establish a conspiracy. However, such facts and circumstances, if shown by the evidence in the case, may be considered by you, the jury, along with all the other evidence in the case, in determining whether such similarity in competitive practices resulted from independent, individual business judgment from the parties competing in the market or whether it resulted from a mutual agreement or arrangement or understanding between two or more competitors.

In considering whether there was a conspiracy, you should bear in mind that a conspiracy does not have to be completely formed at one place or at one time. It can be put together a little at a time and can be joined at different times or in different ways by each alleged conspirator.

What must be proved beyond a reasonable doubt is that the alleged conspiracy was knowingly formed and that two or more persons, including one or more of the Defendants, knowingly became members of the conspiracy charged in the indictment.

Now, there has been an issue raised that, even if—and it is, of course, denied there ever was a conspiracy—but it is contended that, even if one did exist, the Defendants or certain of them ceased to participate [14, 877] in any conspiratorial activity prior to December 27, 1968, and, therefore, cannot be found guilty, because they were not members of any conspiracy within the Statute of Limitations.

In order to find that a defendant abandoned or withdrew from a conspiracy prior to December 27, 1968, you must find, from the evidence, that he or it took some affirmative action to disavow or defeat its purpose. Mere inaction would not be enough to demonstrate abandonment. To withdraw, a defendant either must have affirmatively notified each other member of the conspiracy he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence, or he must make disclosures of the illegal scheme to law enforcement officials.

Thus, once a defendant is shown to have joined a conspiracy, in order for you to find he abandoned the conspiracy, the evidence must show that the defendant took some definite, decisive step, indicating a complete disassociation from the unlawful enterprise.

[14,878] A conspiracy to fix prices in or affecting interstate trade or commerce is, without more, an unreasonable restraint of trade which violates the Sherman Antitrust Act. Whether the prices agreed to be fixed were reasonable or unreasonable or too high or too low is immaterial. A price fixing conspiracy, such as is here charged, may consist in any actual agreement or arrangement or understanding between two or more competitors, or others, knowingly made, to sell at a uniform price or to raise prices or to lower prices or to stablize prices, so a common plan or understanding, knowingly made or arranged or entered into between two or more competitors to adopt or follow or adhere to any pricing formula which will result in raising or lowering or maintaining at fixed levels prices charged for goods or services sold in interstate trade or commerce would constitute a price fixing conspiracy in violation of the Sherman Antitrust Act.

The mere fact the Defendants may have charged identical prices for goods and services does not necessarily establish a conspiracy, since the business concerns may lawfully charge identical prices to those charged by competitors and still not violate the Sherman Antitrust Act. A business concern may even copy the price list of a competitor or follow exactly the price changes of a competitor, and that, without more, would not be a violation of [14,879] law, unless such acts were done pursuant to an agreement, arrangement or understanding between two or more persons, such as is charged in the indictment.

If a company, acting independently, arrives at identical decisions and actions, without an understanding or agreement with its competitors, even if it has knowledge of its competitors' actions, his actions are perfectly legal. Mere similarity or identity of prices charged, without more, does not establish the existence of conspiracy, such as is here charged. However, as I told you, such facts and circumstances shown by the evidence in the case may be considered by you, the jury, in determining whether the similarity or identity of pricing resulted from independent acts of business concerns freely competing in the open market or whether it resulted from a mutual agreement or arrangement or understanding between two or more of them.

These same principles apply to agreements on matters which are actually part of the ultimate or final price of a commodity. Thus, an agreement that is found to exist to fix the terms and conditions of sale of gypsum board would be unlawful, in and of itself, without more. That is because, as your common sense and experience will tell you, the amount of cash discount and the time within which it may be earned by the customer, as well as the [14,880] length of time a customer is afforded before he may pay for the items he may purchase are, in reality, components or parts of the actual price the consumer must ultimately pay for the product that he is furnished.

[14,881] The COURT. Now, there are two essential elements which must be proved in order to establish the offense of conspiracy as charged in this indictment:

First, that the conspiracy described in the indictment was knowingly formed and was existing at or about the time alleged; and,

Second, that the defendants knowingly became members of the conspiracy as charged.

If the jury should find—you, the jury, should find, beyond a reasonable doubt, from the evidence in the case, that existence of the conspiracy charged in the indictment has been proved, then the conspiracy offense charged is complete, and it is complete as to every person found by the jury to have been knowingly a member of the conspiracy, regardless of whether such a person knowingly became a member at its inception or the

attorneys for the company by which he is employed or with the Government.

Now, you have heard testimony, from some of the witnesses at this trial, that they did, in fact, have consultation with attorneys before or during the trial or both. I therefore charge you that you should draw no inference from the fact that any witness had such consultation with his attorney prior or during his testimony. The attorneys would not know what questions to ask if they couldn't talk to the witnesses; they wouldn't know what the witnesses know. There is nothing wrong or improper about somebody talking to an attorney for a defendant or an attorney for the prosecution.

Now, of course, if you think that that conversation was for the purpose of telling him what to say or changing his testimony or influencing it in some way, if you find that that is what happened, then you may draw such inference [14,884] therefrom as you deem appropriate, as to the credibility of the witness or the weight of his testimony.

[14,885] I also want to remind you that we are concerned, here, with the Sherman Act, with an antitrust violation. The fact any particular company's antitrust policies may or may not have been violated or legal counsel may or may not have advised their company that a particular action was or was not a violation of the antitrust laws has relevance only insofar as it bears on the alleged violation of the Sherman Act, which is your concern. As I pointed out during the trial, you are to take your instructions from me, and you are not to take it from counsel or what any attorney might have told any client about the legality of what he was doing.

Now, in any trial, such as this one, with several Defendants, there is danger that a Defendant will not be judged solely upon the evidence applicable to him. In this regard, you must consider the evidence as to each Defendant separately.

You have two questions to determine: First, whether there was a conspiracy of the character alleged in the indictment; and, second, if so, which of the Defendants, if any or all, were knowing participants in it. This involves an examination of the evidence, separately, with respect to each Defendant.

Now, in this instance—in this case, two of the Defendants are represented by one attorney. You still [14,886] must ex-

beginning of the conspiracy or afterward, during the continuance of the conspiracy.

As stated before, the burden is upon the prosecution to prove, beyond a reasonable doubt, every element, every essential element of the crime charged. The law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence. In order to establish the offense charged in the indictment, the proof need not show that the accused acted with the specific [14,882] intent or bad purpose either to disobey or disregard the law. The element of the offense—the element of intent as to offense charged is established if the evidence in the case shows, beyond a reasonable doubt, that the act or acts of the accused were voluntary and intentional—that is, that they were knowingly done.

It is not necessary for the prosecution to prove that a defendant knew or knows that a particular act or failure to act is a violation of law. Unless the evidence in the case leads to a contrary conclusion, the presumption is that every person knows what the law forbids and what the law requires to be done.

Thus, if it should be found, beyond a reasonable doubt, from the evidence in the case, that the conspiracy charged in the indictment was knowingly formed and that the defendants knowingly became members of the conspiracy as charged, then the fact that a defendant may have believed, in good faith, that what was being done was not unlawful would not be a defense.

A conspiracy to raise, fix, maintain and stabilize prices in or affecting interstate trade or commerce is unlawful, even though the conspiracy may be formed or engaged in for what appears, to the conspirators, to be laudable motives. A price fixing conspiracy, such as charged in the indictment, cannot be justified in the law, even [14,883] though the conspiracy may have been formed or engaged in to prevent or halt ruinous competition or to eliminate the evils of price cutting or to give each competitor what the conspirators think is his fair share of the market.

Now, every witness who appears in a case has the legal right to the assistance of counsel before and during the time he testifies at trial. Every witness has this legal right and also has the right to discuss his testimony with his attorney or with the

amine the evidence as to each of those independently and reach your conclusion based on that evidence independently. Each Defendant has the right to have you consider the evidence from his point of view—that is, you are to consider whether or not the evidence shows him individually guilty or not, and, unless you are convinced beyond a reasonable doubt of the guilt of a Defendant, you must return a verdict of not guilty as to that individual.

On the other hand, if you find that, as to any or all of the Defendants, they were proved guilty beyond a reasonable doubt, then it is your duty to return a verdict of guilty.

Several of the Defendants in this case are corporations. In your determination of the issues in this case, you should remember that a corporation is entitled to the same fair trial at your hands as is an individual. All persons, including a corporation, stand equal before the law and are to be dealt with as equals in a court of justice.

We will go off the record for just a minute.

[Discussion was held off the record.]

The COURT. As I have said earlier, there is an additional element which you must find before any of the corporations—before you could find any of the corporate Defendants guilty of the charges against them.

[14,887] A corporation is, in law, a person, but it cannot act except through its directors or officers or employees or other agents. A corporation is not responsible for an unlawful act—criminally responsible for an unlawful act of the directors or officers or employees or other agents unless this was done within the scope of their authority.

Now, let me give you an example. This didn't happen, but, if Mr. Brown's chauffer, if he has a chauffer, would have a discussion with Mr. Nicely's gardener, if he has a gardener, and those two fellows said, "I think it would be nice if we got together and raised the prices," that couldn't bind that corporation, because gardeners and chauffers haves no—this is totally outside the scope of their authority. They might have authority, for example, to order new tires or order some special kind of grass seed, but the corporations can't be held responsible unless the agent acting for the corporation had authority to do so.

I wouldn't want to imply, by that, that either of those gentlemen have any such employees or that they had any such discussion, of course. You understand that I am using it purely for the purpose of example.

Before you may consider any conspiratorial act or statement of the Defendants' respective employees binding upon any Defendant, you must, therefore, first find, beyond a reasonable doubt, that the employee was authorized to act [14,888] or speak on behalf of the Defendant and that the act or statement was actually adopted by the officials of the corporation after it was done.

[14,889] Otherwise, you may not consider what was said and done by Defendants' employees as binding upon a particular Defendant.

You will remember, however, that, in order for a corporation to be responsible for acts or statements of one of its agents, it is not necessary that the corporation specifically authorized the agent to commit the act or make the statement. A corporation is legally bound by the acts or statements of its agents, done or made within the scope of their employment or apparent authority.

Acts within the scope of employment are acts done on behalf of the corporation and directly related to the performance of the type of duties the employee has general authority to perform.

Apparent authority is that which outsiders would reasonably assume that the agent would have, judging from his position with the company, the responsibilities previously entrusted to him, and the circumstances surrounding his past conduct.

When the act of the agent is within the scope of his employment or apparent authority, the corporation is held legally responsible for it, although what he did may actually be contrary to his instructions and be unlawful.

As an example of that, the transportation company—a cab company would tell each of its drivers, in writing, [14,890] "You are not permitted to drive beyond 40 miles an hour," and the man did drive faster and injured somebody. The fact that such an instruction had been given wouldn't be a defense.

If you conclude that an agent of a Defendant corporation acted on behalf of a Defendant corporation and, within the scope of his employment or apparent authority, engaged in the conspiracy charged in the indictment, then it is no defense that the corporation had instructed its employees, orally or in writing, to comply with the antitrust laws.

Now, Mr. Watt, Mr. Brown, and Mr. Nicely, as corporate directors or officers, cannot be held criminally responsible for the acts of other corporate directors, officers, or agents, unless it is established beyond a reasonable doubt by independent evidence that each of them, the three I named or one or more of them, were members of a conspiracy.

An individual Defendant cannot be found guilty by you merely because of the position he holds in a corporation, nor for the performance of purely ministerial acts taken in his corporate capacity. Merely by his employment or association with a Defendant corporation, an individual Defendant is not responsible for the actions of his co-employees, including subordinates, which may have [14,891] been committed without his knowledge or authorization. Each of the individual Defendants is also entitled, of course, to the benefit of the presumption of innocence and the standard of reasonable doubt which I explained to you previously.

Although, as I have already instructed you, a corporation may be held liable on the basis of an act or statement of an agent possessing adequate authority, even though that agent may have acted contrary to his actual instructions, the same is not true of a corporate officer.

A corporate officer may be held criminally liable on the basis of acts of another person only if it appears beyond a reasonable doubt that he ordered, directed, authorized, or consented to the act in question. Of course, an individual Defendant is responsible for his own acts or statements.

I further instruct you that you may not find any of the individual Defendants guilty unless the corporation of which he is an officer is also found guilty. This is because the charge is directed against the individuals in their capacity as officers and agents of their companies.

In addition, you would not be warranted in finding any individual Defendant guilty, unless you find beyond a reasonable doubt that, knowing of the existence of the conspiracy, he

took some action or authorized or directed [14,892] the employment of one or more means and methods in furtherance of the conspiracy, as I explained to you earlier.

In considering the question of the individuals in this case, you should keep in mind the instructions concerning direct and circumstantial evidence.

Consider the individual Defendant's position within the corporation, his relationship to his superiors, such directions to them as he might have made, such reports they, in return, might have made to him, and the timing and surrounding circumstances of such communications.

In other words, consider all the evidence bearing on the question of whether each or any of the individual Defendants ordered, authorized, or consented to acts done by their subordinates in considering whether the Government has sustained its burden of proof beyond a reasonable doubt as to the three individual Defendants.

Now, ladies and gentlemen of the jury, we have reached that stage of the case where the counsel for the Government and the defense have the right to tell me that which I said which they think is wrong or that which I didn't say which they think I should say; and, for that purpose, I am going to excuse you to return to the jury room and give them the opportunity, now to make such objections, corrections, or request for additional charge as they may see fit.

[14,893] In that regard, I was presented by Georgia-Pacific with supplemental requests A, B, and C, and D. These are denied, except to the extent that I have charged them in substance in my charge.

Would you excuse the jury now, please?

Ladies and gentlemen, don't start your deliberations yet. You wait until I tell you to.

[The jury retired from the courtroom at 3:45 p.m. o'clock.]

[14,894] The COURT. Gentlemen, are there any objections to the charge or requests for additional charge?

Mr. DELONE. I don't know how we want to proceed. Do you want to hear from the Defendants first?

The COURT. Does the Government have any, Mr. Fricano?

Mr. FRICANO. No, Your Honor. We have listened intently to the Court. I believe, based upon my notes and the caucus of

the gentlemen here, what you outlined in your charge to be what you gave. We would like to have seen a few more of our points given, but we thought the charge was fairly given, Your Honor.

The COURT. Any Defendants?

Mr. DELONE. I take it you want me to go first, Mr. Keck.

Of course, I except, as I assume all the Defendants do, to the refusal to give points which we requested, the requests we made to Your Honor, to the extent that I haven't obviously had a chance to check over the whole batch of those, but I don't think there is any need to do that. We still press the points we asked Your Honor to give. To the extent you didn't affirm them, we except to them, those that--at least I except on behalf of National.

The COURT. Any objections you make [14,895] will inure to anybody's benefit unless they disavow it. Nobody need repeat it.

Mr. DELONE. In the course of Your Honor's charge you made reference several times to the fact that the jury should not—should deliberate without regard for the consequences. I thought, Your Honor, the purpose was to deal with the fact that the sentencing matter is one——

The COURT. That is exactly what I meant.

Mr. DELONE. Well, it seemed to me that as you put it, you went beyond sentencing and encouraged what might—it might be misconstrued to really encourage the jury to think it is not a serious consideration when you said they are not to be concerned with the consequences. Those were the words. They didn't seem to be limited to the sentence.

The COURT. What other consequences do you think they would be concerned about besides sentencing?

Mr. DELONE. I am sure I don't know, sir, but I think the decision of great moment to us—

The COURT. Fine. I will tell the jury, if you want me to, I didn't refer to any other consequences except sentencing. If you want that, I will do it. I am not sure you should want it, but that is your business.

[14,896] I can't conceive of what other consequences they could speculate about.

Mr. FRICANO. I would object. That is undue emphasis. I thought it was perfectly clear.

Mr. DELONE. I did not, sir.

The COURT. Since I spoke specifically about sentencing before I told them, used the term consequences, I frankly think the objection is frivolous, but I will tell them that consequence referred to sentencing.

Mr. DELONE. Thank you, sir.

And then Your Honor shortly after that made reference to the fact, as I heard Your Honor, that the jury must draw inferences when you were talking about the inference drawing process. I think the word is may, not must, and as I heard it—and I have to rely on my notes—you said they must draw inferences, which I don't think is a correct statement of the law.

The COURT. I think I told them at least five times they should draw such inferences as they deem appropriate, which is the equivalent of saying may instead of must.

Mr. DELONE. If Your Honor will excuse me just a moment, I am having a little trouble reading my notes here.

Mr. BARTLIT. Your Honor, if Mr. DeLone [14,897] would like some time——

Mr. DELONE. No, that is all right.

Your Honor in the course of explaining reasonable doubt said something to the effect that the jury should not simply to—to avoid an unpleasant duty, they——

The COURT. Yes.

Mr. DELONE. ——make a finding beyond a reasonable doubt, and that was the language which I heard and I do not think that was a correct statement of the law, sir.

The COURT. Your objection is noted.

Mr. DELONE. Then——

The COURT. What I told them was the standard charge that by reasonable doubt we do not mean one that is conjured up to avoid an unpleasant duty. If you can show me authority for the fact that is not a correct statement of the law, I would like to see it.

Mr. DELONE. I don't have any such authority with me.

The COURT. Do you know of any such authority?

Mr. DELONE. No, not off the top of my head, because I didn't understand the statement as Your Honor just said.

The COURT. That is what I have said [14,898] and that is what has been said in this Court, to the best of my knowledge, for 30 years.

Mr. DELONE. Then Your Honor read all the means and methods paragraphs of the indictment.

I do object to that, sir. It seems thereafter you lumped them and treated them in a way which made them understandable. I do not think—I except to the reading of all of it.

The COURT. We will correct it. I will send out the indictment with the jury.

Mr. DELONE. We had asked Your Honor initially on the subject, and I thought Your Honor ruled you were not going to send out the indictment.

The COURT. But you have raised a question that seems to indicate the jury might be clearer if they saw the indictment. I had no intention to do it, but in view of that kind of objection, to put it in the proper context, I will send it out.

Mr. DELONE. My objection is that you read word-for-word for the means and methods in the indictment, not any lack of clarity, but it seems to me that runs counter to what you originally said, that the indictment was not to be put before the jury, nor the means and methods section of the indictment, and I would object to sending the indictment out to the jury as compounding the [14,899] situation in giving that so much in this charge.

The COURT. So that the ways and means fit into the general charge of the indictment, so they will see where it fits into the indictment as a whole, I will change my ruling and send out the indictment with the jury.

[14,900] Mr. DELONE. Well, I would except in advance then.

The COURT. Well, I have a perfect right to send out the indictment with the jury.

Mr. BARTLIT. Well, Your Honor, I don't join in that particular objection of Mr. DeLone's for Mr. Watt. I do not want that sent to the jury, and I don't see any reason for it to be sent.

Mr. DELONE. Neither do I.

The COURT. Well, you have made your objection on the basis that I read part of the indictment, which you claim prejudices you somehow. So, rather than prejudice you somehow, why I will let them see the whole thing, and thus not put myself in that unfortunate position of having prejudiced you.

Mr. DELONE. If I haven't made my point clear, I want to, sir. I think the reiteration of the mention——

The COURT. You made your point perfectly clear. You said that by telling them what the ways and means were somehow or other I prejudiced you by not, by overemphasizing the ways and means. And now I say to you so that they wouldn't lose—so that the jury will not misunderstand how it fits in with the charge in the indictment, I am going to send out the charges on the [14,901] indictment as a whole. We will take off that section of the indictment that refers to pleas by anybody. We will just photostat those parts of the indictment that don't contain the nolo contendre pleas, of the pleas that were entered by various Defendants.

Mr. DELONE. Then Your Honor in charging the jury with reference to the first four paragraphs of the means and methods portion of the indictment said, as I understood it, that uniform prices—that the jury could draw an inference of conspiracy from the fact that there were uniform prices unrelated to supply and demand. I don't believe there is evidence. I don't believe there is sufficient—I don't believe that's a sound proposition of the law, sir, nor that there is evidence to warrant such inference-drawing in this case.

The COURT. Let me find specifically what I said there, because what you say I said doesn't sound to me like what I said.

Mr. DELONE. Well, I am sure I cant repeat it word for word, Your Honor. I am just doing the best I can with the notes I have taken.

The COURT. Okay, go ahead. You put that objection on the record.

Mr. DELONE. And Your Honor made reference to the maintenance of price protection lists by [14,902] the Defendants. So far as National Gypsum is concerned, there is no evidence, I submit, sir, that it maintained any such lists; and, therefore, as to National I would ask the Court to make clear that it did not, there is no evidence that it maintained such a——

The COURT. What I meant to say, if I didn't, was that there was a price protection list to which all had access. I will say that.

Mr. DELONE. Well, I would ask you then——

The COURT. But it was USG's list.

Mr. DeLone. And there was also no evidence that National ever availed itself of that list.

The Court. I didn't say they did. I said they had access to it.

Mr. DeLone. Well, I would ask Your Honor if you mention access, to mention there is no evidence that we utilized the access.

The Court. No, I am not going to say that.

Mr. DeLone. And then Your Honor summarized the Defendants' contention with reference to the checking or verification as to job price protection as being for the purpose of prevention of fraud, as I understood what Your Honor said. It seems to me our contention [14,903] is other than that, or at least that may be part of the Defendants' contention. But there is also the contention that the checking of whether job price protection had been offered by a competitor was to determine whether, for Robinson-Patman Act purposes, the Defendants doing the checking would also offer it. And I don't think it was limited to prevention of fraud subject, sir. In other words, it is also the meeting competition problem.

And then when Your Honor went forward in discussing the Robinson-Patman Act, you said that the Defendants do not dispute that they did engage in verification. That is correct, sir; although your comments were not time limited. There is a contention, as I understand it, by USG that they stopped in 1968, and National in January of 1969.

The Court. I didn't comment on time.

Mr. DeLone. You didn't comment on the time at all, sir. I would ask that you do that.

The Court. Well, I haven't commented on evidence anyplace else, and I am not going to comment on it there. You have certainly discussed that quite adequately. And I will tell the jury, of course, that your own summary of contentions is to take precedence over mine.

Mr. DeLone. Yes, sir. I did discuss [14,904] it. There is no question about that. And I don't dispute what Your Honor said except for the time factor. You then said that it was solely—that is, the checking or verification—our contention was solely to insure compliance with the Robinson-Patman Act. There was the further contention of prevention of fraud by the lying buyer.

The Court. You said that. I told you I would tell them that.

Mr. DeLone. This is not limited to the job price protection, but to the verification generally, sir, so that I make myself clear.

The Court. Well, I will make it general, not limit it.

Mr. DeLone. That will be fine, sir. Thank you.

[14,905] Mr. DeLone. As I understood Your Honor's charge, you said that if the effect of exchange of pricing information was to raise, fix, maintain and stabilize prices, that would mean there was an unlawful intent. That would only be, it seems to me, sir, if there were an agreement.

The Court. Oh, I said that five times. I won't say five. I think I said it more than that. I said quite frequently there must have been an agreement.

Mr. DeLone. Then when you turned to the predatory conduct case, you said—and I think inadvertently—I heard you say—and I have to rely on my notes, sir—conduct agreed upon and directed to Texas and Republic.

The Court. I said in this case the alleged predatory conduct concerned—the contention concerned Texas and Republic.

Mr. DeLone. I thought you used—and I say inadvertently—I believe, sir, conduct agreed to and directed toward, and if that were the case, that would assume a fact different from——

The Court. It had to be agreed to.

Mr. DeLone. But Your Honor assumed, as I say, inadvertently, I think, you meant alleged, but as it came out, I heard it to be, in effect, Your Honor [14,906] saying there was an agreement about conduct directed——

The Court. Oh, no. Certainly, I didn't.

All right, we will charge it again. I will charge the whole thing again about predatory conduct, if that is what you want.

Mr. DeLone. I am not asking that, sir.

The Court. You say I said that. I will charge it again.

Mr. Mellott. If Your Honor please, I think the word used by Your Honor was alleged conduct.

The Court. Since I don't know what I said, I will charge it again. I don't know now what I said and if I said something inadvertently, I didn't mean to say, I will correct it by recharging on predatory conduct. I don't know if I inadvertently said something or not.

Mr. DeLone. All I would ask you to say, if you said it you intended the word "alleged."

The COURT. I don't know if I intended the word "alleged" or not. So therefore, I will recharge on predatory conduct.

Mr. DELONE. I would except to recharging the whole charge.

[14,907] The COURT. I can't take your notes as representing what I said and then correct something.

Mr. DELONE. I, sir, am in the position of having to tell you what I think was wrong with your charge, too.

The COURT. I have to do it my way by checking it the only way I know how.

Mr. DELONE. I except to reiterating the whole charge.

The COURT. You don't have to except. You know that is automatic.

Mr. DELONE. Then in—also in the predatory charge portion, I understood Your Honor to say competitive efforts against particular companies may be evidence of agreement.

The COURT. Here is what I said. I said about that, on the matter:

> The evidence of so-called predatory conduct you will recall relates primarily to the Texas Gypsum Company and the Republic Gypsum Company.

Now that is what I said. I will restate it, though, to make sure it is perfectly clear.

Mr. DELONE. Going on, sir, in that portion, if Your Honor has it there, I think you will see the—what I noted—and I have checked with others [14,908] before raising these things, sir, who have been trying to take notes as best we can—competitive efforts, competitive effort against particular companies may be evidence of agreement to raise, fix prices. I don't think that competitive efforts can be evidence——

The COURT. What I said was, "Competitive effort directed or focused against specific companies may be evidence that the alleged conspirator corporations were seeking to raise, fix, maintain, stabilize prices by curtailing or eliminating the competition of those companies.

Mr. DELONE. To me it—the two concepts are foreign.

The COURT. I will recharge that eliminating the word "competitive" and say efforts against specific companies may be evidence that the alleged conspirators were seeking to, etc. The word "competitive" could have been—it could have been confusing.

Mr. DELONE. I thought Your Honor adverted to the fact that the jury could infer a conspiracy within the statutory period from evidence of conspiracy subsequent to December 27, 1973, and I think you have scrupulously not been letting any such evidence in.

The COURT. What I said, if there is evidence that it continued beyond the statutory period, [14,909] they could, of course, consider that as evidence as to whether or not it existed during the statutory period, which I think is a correct statement of the law.

Mr. DELONE. I don't believe there is any evidence here.

The COURT. If there isn't any, there is no problem.

Mr. DELONE. It was carefully kept out.

The COURT. I think I hedged that by saying just that, if there is any such evidence, they may, of course, consider that."

Mr. DELONE. And Your Honor charged about unreasonable inferences with reference to the antitrust law is to preserve the free flow of commerce and avoid unreasonable interference by agreement or conspiracy and went on to describe our system of competition and the alternative being controlled by monolithic bureaucracy. It seems to me in this case those remarks are inappropriate. They deal with what may be the philosophy behind the antitrust laws, but are no aid to this jury and may indeed——

The COURT. They were intended as an expression of the philosophy behind the antitrust laws.

Mr. DELONE. I think for purposes of charging this jury, they are inappropriate, sir.

[14,910] The COURT. What would you suggest?

Mr. DELONE. I think they should have been left out.

The COURT. What are you suggesting now?

Mr. DELONE. At this point it is hard to suggest anything, since it has already been said. I would guess the only thing to say is to retract them.

The COURT. I will restate them.

Mr. FRICANO. May I comment, Your Honor?

The COURT. No. I am going to restate them to the jury.

Mr. MELLOTT. If the Court please, on behalf of Georgia-Pacific——

The COURT. I told everybody I was going to charge that way previously, and nobody objected to it. At this stage Mr. DeLone stands up and makes a statement like that. I am going to recharge it now.

Mr. DELONE. I beg your pardon, sir?

The COURT. I said beforehand. I sat here on two occasions and told you I was going to charge that way and you didn't say word number one. Now I will recharge it by leaving out the term "unreasonable."

Mr. DELONE. Well, with due respect, sir——

[14,911] The COURT. I don't want to debate it any further. I don't think that's a proper thing to have done, and I will recharge the jury on it.

Mr. DELONE. I would ask Your Honor not to recharge the jury. .And I would ask you, sir, with all due respect—and I must say that I was not aware that Your Honor was going to charge as you did in reference to . . .

The COURT. Well then you didn't listen.

Mr. DELONE. I did not hear monolithic bureaucracy.

The COURT. This is late in the game to be making that.

Mr. DELONE. If Your Honor please, this is the only time I have. As you said over and over again, we could take exceptions to your charge after we have heard it.

The COURT. All right. You have made it and I am going to recharge it now.

Mr. DELONE. Your Honor also charged the jury that "any agreement to raise or lower prices." There is no charge in the indictment of agreement to lower prices.

The COURT. There is too. There is an agreement to fix, which could be either to raise or to [14,912] lower.

Mr. DELONE. Your Honor made reference to apparent authority. And, although I recognize there is some contrary authority, I do not believe apparent authority has any place so far as corporate responsibility in a criminal case, and therefore I except to that portion of your charge.

Mr. FRICANO. This was already ruled on, Your Honor, when you outlined it, just like when you said that it was the death knell of competition. You said that and no one took exception to it, right in this courtroom.

The COURT. I am not going to recharge on that. I think that's a correct statement of the law. I am going to recharge on the

philosophy because I used the word "unreasonable," which really has nothing to do with a price fixing charge.

Mr. DELONE. I have no further exceptions at this time.

The COURT. Mr. Mellott?

Mr. MELLOTT. Yes, Your Honor.

First of all I, of course, object to the extent that Your Honor didn't include in the charge any of the requests which were submitted.

The COURT. Didn't you hear me say [14,913] that that would go for everybody? Let's not waste time, I said. I said in response to Mr. DeLone that any objection he made would inure to the benefit of everybody.

Proceed.

Mr. MELLOTT. I thought that related to the ones made on behalf of everyone, Your Honor. I am sorry.

The COURT. It relates to all charges which I did not give which people asked me to give. If there is any I didn't give——

Mr. MELLOTT. All right, Your Honor.

Now I object to Your Honor's emphasis of the fact that circumstantial evidence can be better than direct. I submit that Your Honor should have pointed out on the other hand that direct may also be better than circumstantial.

The COURT. I said that either circumstantial evidence, direct evidence, or both was sufficient.

Mr. MELLOTT. But Your Honor pointed out only that circumstantial evidence is better than direct.

The COURT. Okay. Go ahead.

Mr. MELLOTT. Your Honor, I object to Your Honor's charge that the charge in this case can be construed to be either a conspiracy to fix, maintain, raise, or stabilize prices.

[14,914] The COURT. I listened to the closing arguments, and counsel after counsel used "or" instead of "and."

Mr. MELLOTT. I object to it.

The COURT. And I want to say something else.

Certainly "or" is the proper interpretation, not "and".

Mr. MELLOTT. Well, I respectfully disagree with you, your Honor.

The COURT. Certainly if there is a conspiracy to fix prices, if there is a conspiracy to raise prices, you don't have to also show a conspiracy to stabilize. That's enough. And if you think not, so be it.

Mr. MELLOTT. Your Honor, I also object to the undue emphasis which I believe Your Honor placed on, with reference to the verification that what the jury must find is whether there was an agreement to engage in price verification.

I think that directs attention to the wrong agreement. The question is not whether there was an agreement to engage in price verification, but whether there was an agreement to use that technique for the purpose of raising, fixing, maintaining, or stabilizing prices.

The COURT. That's an incorrect [14,915] statement of the law.

Go ahead. Since purpose plays no role in this, that's just an incorrect statement of the law.

Mr. MELLOTT. I believe that the effect of what you said——

The COURT. Proceed. You have made your objection.

Go ahead.

Mr. MELLOTT. All right.

I object, Your Honor, on behalf of my client, to any further repeating of the charge on predatory conduct which I believe—I object to the charge because I believe it left out any concept of predatory intent, which is obviously required.

And I believe that a restatement of that charge at this time simply compounds the error.

The COURT. Talk to your associate about that.

Mr. MELLOTT. All right, sir.

I object to Your Honor's failure to include in the charge a provision to the effect that the jury must first find a conspiracy within the statutory period for which the defendants are consciously committed before they can consider the evidence before the statutory period.

I object to the fact that Your Honor did not [14,916] include in the charge with reference to Georgia-Pacific coming into the business after April 1965, the concept that Georgia-Pacific, they had to find beyond a reasonable doubt that Georgia-Pacific became consciously committed to the alleged conspiracy after April 1965.

The COURT. I used almost those exact words.

Mr. MELLOTT. Your Honor left out the words "consciously committed," which I believe to be important.

The COURT. Go ahead.

I said that various times, but you go ahead.

Mr. MELLOTT. That's all I have, Your Honor.

[14,917] The COURT. Mr. McSweeney.

Mr. MCSWEENEY. Your Honor, I have the following objection with respect to the Court's instruction as to drawing reasonable inferences. I don't—I object that the instructions did not go far enough in that it did not tell the law with respect to drawing inferences and you could not draw an inference on an inference and instructions such as we proposed in requests 53 and 54.

The COURT. You have some authority for that, Mr. McSweeney?

Mr. MCSWEENEY. What we cited in our requests, sir, for inferences to the Court in our original joint request, Your Honor.

I object, Your Honor, to what was the Government's proposed charge which the Court gave saying the jurors, that is in connection with expert witnesses, and as the Government suggested, could—you instructed the jurors you are the real experts for determining the facts and so forth.

The COURT. On innocence or guilt. That is what I said, and they are. Because you put an expert on the stand who purported to say these men are not guilty and I said to the jury you are the experts on innocence or guilt, which they are.

Mr. MCSWEENEY. It is certainly their [14,918] province, Your Honor, but using the words as suggested by the Government, experts in connection with the instructions with respect to the law on experts, seems to me was in derogation——

The COURT. Maybe you are right. I think I will call them back and instruct them to ignore any opinion that Dr. Cyert expressed on innocence or guilt and they should pass on it themselves and I will omit the word "expert." That is what you want, isn't it?

Mr. MCSWEENEY. No, it is not.

The COURT. What is it you want?

Mr. MCSWEENEY. I should think that you should not have used the expression, I would not use—when you discussed about experts, you should give due accord to an expert's opinion.

The COURT. I think that is frivolous and it is overruled.

I have read your request 53 again and I still think it is wrong.

Mr. McSweeney. If the Court please—excuse me.

The Court. Go ahead.

Mr. McSweeney. If the Court please, I object to your reference when you refer to the indictment, to have referred to the dates being unknown to the Grand [14,919] Jury. There should not be, at this point, any reference to the Grand Jurors.

The Court. Since they are going to see the indictment and it is printed right there—it is right there, to the Grand Jurors unknown is right in the indictment.

Mr. McSweeney. I would object, of course, to their seeing the indictment.

The Court. Can you cite me a case that says I don't have the right to send out the indictment?

Mr. McSweeney. I will try to find one. I don't have one with me, because I didn't know when I came here that Your Honor was going to send out the indictment.

The Court. I think most judges in this court send out the indictment. I don't usually.

Mr. McSweeney. I think it would be particularly prejudicial, because we had the problem of the excessive publicity at the time of the pleas earlier and this indictment will recall that to mind with Kaiser and Flintkote and the individuals.

The Court. I charged them they are not to speculate on that.

Mr. McSweeney. And the individuals—well, yes, you have but I think under the circumstances [14,920] of this case, where we had to defer the commencement of this trial once because of that tremendous publicity, that it would be, particularly in this case, whatever the general rule may be, to send that indictment at this point to the jury would be particularly prejudicial.

The Court. All right.

Mr. McSweeney. Your Honor, I object to the instruction to the effect that the Defendants with respect to the Defendants not contesting that they exchanged job price protection information or job price protection lists——

The Court. I have already said I am going to say that only United States Gypsum had such a list and that that list was available to anybody else.

Mr. Fricano. If Your Honor please——

The Court. Which is what it was.

Mr. Fricano. There was more than one list. United States Gypsum was the only one that kept it with Arthur Anderson. We have proved, I think, by the testimony that each Defendant had a list.

The Court. Every Defendant had a list is right.

Mr. McSweeney. In that connection, with respect to job price protection verification, verification with respect to job price protection, there was no [14,921] mention that if it was done for purposes of the Robinson-Patman-Act that would be legal.

The Court. Have you not heard? Weren't you listening when Mr. DeLone made that same objection and I said I would correct it.

Mr. McSweeney. I was listening and apparently I didn't——

The Court. Am I wrong? I thought Mr. DeLone said exactly that and I said I would charge that.

Mr. McSweeney. I appreciate that. I am sorry if I repeated one of those objections of his.

Do I understand that the Court has decided to recharge on predatory conduct?

The Court. Yes.

Mr. McSweeney. In that connection, although I do not want you to do it and object to it, if you do it, however, I would urge the Court to make clear that in this case there is nothing illegal about this conduct, even if they find it predatory, unless they also find it was pursuant to a conspiracy.

The Court. I said that before. I will say it again.

Mr. McSweeney. Your Honor, I object also to the portion of the charge with respect to the [14,922] jurisdictional requirement, in that by giving the examples of the evidence which would constitute fullfilment of that constitutional requirement of the publishing of a price list or the sale of wallboard in this district, in that that is taking away from the jury its function. The jury must decide whether or not those actions are sufficient so that they could determine beyond a reasonable doubt that they were in furtherance of the conspiracy or part of the conspiracy.

[14,923] Mr. Fricano. If Your Honor please.

The Court. I am not going to charge that way.

Mr. FRICANO. All right.

Mr. MCSWEENEY. Finally. I object, Your Honor, to the charge in that the charge, although referring to verification, did not provide an instruction about the lawfulness of an exchange of price information and other competitive information, even if it was not for purposes of compliance with the Robinson-Patman Act, such as contained in Defendants' Request 20 and Defendants' Supplemental Requests 15 and 16.

The authority for that would be the Maple Floor Case and the Cement Manufacturers Protective Association.

And in that connection I also object to the charging in that it said if the effect of verification was stabilization, then there can be conspiracy regardless of the purpose of the verification; whereas the law is that if the purpose is compliance with the Robinson-Patman Act, even if that should bring about an effect of stabilization, it is not illegal.

The COURT. That is not, so far as I am concerned, the law at all, and I am not going to charge that way. In other words, I think if it violates both sections, if it is done for the purpose of a defense to [14,924] Robinson-Patman but it violates the other section, that's a violation of the law. I didn't charge that way. I will if you wish.

Mr. MCSWEENEY. No. Of course, I would not want that, because I don't consider that the law.

The COURT. Now when you raise that kind of thing I tried to avoid saying that. But if you wish, I will say it.

Mr. MCSWEENEY. Well, Your Honor, I certainly do not wish that.

The COURT. Well, you say I am wrong the way I said it. Now if you want me to, I will say it exactly the way I think is right. I tried to avoid making that kind of a harsh statement, but I will say it if you want me to.

Mr. MCSWEENEY. I do not want you to say that.

The COURT. You are raising it; aren't you?

Mr. MCSWEENEY. I don't want you to say it, Your Honor. I say what I think the law is. I think the law is quite the contrary. We apparently have a difference of view of the law.

The COURT. We sure do.

Mr. MCSWEENEY. Yes, we do.

[14,925] The COURT. That's all right. There is nothing wrong with that. You can disagree with me.

Mr. MCSWEENEY. But Your Honor shouldn't be——

The COURT. I am merely saying that if you want me to state my thoughts on the matter quite clearly, so that a reviewing authority can review it if they want to, I will do it. My thoughts are that if it violates the Sherman Act, even though it is done for some other purpose——

Mr. MCSWEENEY. I don't want to provoke Your Honor into giving an instruction which I consider wrong. I would consider if you did that it would be error.

The COURT. You consider the way I did do it error, too.

Mr. MCSWEENEY. That's why I do not want you to do that.

The COURT. All right, go ahead.

Mr. MCSWEENEY. I object——

The COURT. Just one moment.

Mr. MCSWEENEY. Excuse me, Your Honor.

[Discussion held off the record.]

The COURT. All right.

Mr. MCSWEENEY. I object to the Court's definition and example with respect to implied agreement [14,926] in that I feel that it was an inappropriate example for a criminal case, because I think it ignored in that definition of implied agreement the burden of proof and the requirement that the proof be beyond a reasonable doubt.

Those are my objections, Your Honor.

The COURT. All right.

Mr. Keck?

Mr. KECK. Your Honor, I except insofar as Your Honor did not point out the sentence in our Request 51 to this extent, when two inferences can reasonably be drawn from the same facts, one pointing to guilt and the other to innocence——

The COURT. Well, I said that; didn't I?

Mr. KECK [continuing]. You are to adopt the innocent inference.

The COURT. I said that precisely.

Mr. KECK. Well then it is an error in my not hearing it, Your Honor.

The COURT. I said precisely that. That if you can find either innocence or guilt, you must resolve it in favor of innocence and favor of the defendant.

Mr. FRICANO. I cringed at that point, but you did say it, Your Honor.

The COURT. I did say it.

[14,927] Mr. KECK. I beg your pardon if you did say it, Your Honor.

Now referring to your reference to Macy's and Gimbels. Was that written down, Your Honor; or was that something——

The COURT. I do not have that written down.

Mr. KECK. I understood you to say that Macy's could not tell Gimbels, but Macy's could follow Gimbels.

The COURT. Here is what I said:

> If Macy's wants to follow Gimbels' price, there is nothing wrong with that.

Mr. KECK. Yes, sir.

The COURT. "Unless there was an agreement by Macy's to follow Gimbels' price."

Mr. KECK. I didn't understand you to say "agreement." I understood you to say that Macy's can't tell Gimbels, which would seem to suggest a verification.

The COURT. I was trying to point out what you have all claimed. There is nothing wrong with everybody independently charging the same price or even following the price of somebody else so long as there is no agreement to do it. That's what I was attempting to [14,928] set forth.

Mr. KECK. If your statement was that Macy's can't tell Gimbels, I except to it because I think it cuts across what Your Honor said in other requests.

Mr. DELONE. I disassociate myself with that. I heard what Your Honor said, and I think it was correct on that score.

The COURT. If you want me to tell the jury Macy's can tell Gimbels—is that the theory?

Mr. KECK. Yes. I think that they legally can tell Macy's. They can't legally agree.

The COURT. I will ask them to disregard the entire statement that I made concerning Macy's and Gimbels.

Mr. KECK. I would prefer that, Your Honor.

Mr. MELLOTT. Well, Your Honor, I disassociate from that objection, too. I think what you said in that regard, as I recall and heard it, was all right, and I would therefore object to your bringing it up again.

The COURT. Well, Mr. Keck wants me to.

Mr. KECK. May I go on to my next one?

The COURT. Yes.

[14,929] Mr. KECK. Your Honor, I object——

Mr. FRICANO. I would—excuse me, Mr. Keck. Forgive me.

I would join, sorry to say, with Mr. DeLone and Mr. Mellott. I would ask Your Honor not. I think it was a fair statement. I heard it the same way and I think it should be left alone.

The COURT. All right. We will leave it alone.

Mr. KECK. Your Honor in referring to the subject of determination of abandonment of conspiracy named only two precise alternatives and failed to point out that resumption of competitive behavior such as intensified price cutting or price wars could constitute such aggressive action as to terminate conspriacy.

The COURT. I purposely left that out, as I do not think it is a correct statement of the law.

Mr. KECK. You do not?

The COURT. I don't think it is a correct statement of law, so I didn't say it.

Mr. Bartlit.

Mr. BARTLIT. Yes, sir. I will be very brief and I just want to make sure I understand there are several instructions we submitted which are inconsistent [14,930] with these. I am not going to raise these, because they were turned down.

The COURT. Anything I turn down, it is on the record by Mr. DeLone's objection.

Mr. BARTLIT. I apologize for raising it again, but I am sure the Court understands why.

The COURT. I really don't understand why, but go ahead.

Mr. BARTLIT. Maybe I am just tired and it has been a long trial, Judge.

The COURT. Go ahead.

Mr. BARTLIT. The main thing than concerned me, Your Honor, was this: That the Court told the jury that if an individual was found guilty, then the corporation would be found guilty.

The COURT. I said a corporation could not—I said an individual could not be found guilty, if the corporation was not found guilty.

Mr. BARTLIT. Yes, sir. In my mind it tended to link the individual and the corporations too much and I would ear-

nestly request that the Court say it is possible to find a corporation guilty and the individual innocent.

The COURT. I already said it. It was the other way around. I said the individual could [14,931] not be found guilty unless the corporation was, but I will be glad to say that wasn't correct, if you want me to.

Mr. BARTLIT. All I would like you to say, Your Honor, is that an individual can't be found guilty——can be found innocent and the corporation guilty.

The COURT. I already said that.

Mr. WARNKE. My recollection is that you did say exactly that.

The COURT. I sure did.

Mr. BARTLIT. If you said that, then I don't have any objection.

The COURT. The only thing I say is I am amazed if you object if a corporation, if United States Gypsum is not guilty, Mr. Watt can't be guilty.

Mr. BARTLIT. I don't object to that.

The COURT. That is what I said and you are objecting.

Mr. BARTLIT. It is a further step. If you already said that and it is in the record, I will withdraw the objection.

The COURT. I will withdraw that.

Mr. WARNKE. Your Honor, I would hope you would not.

Mr. BARTLIT. I am apparently wrong, Your Honor, and if that is what the record says, I will [14,932] withdraw the objection.

The other two points relate to Your Honor's decision to recharge on purposes of the Sherman Act and to give the jury the indictment. I can't believe recharging on the purposes of the Sherman Act is going to make any difference and I don't think it is going to cure anything. It is only going to give further emphasis and that is a bad thing.

The COURT. I have the impression Mr. DeLone felt that was almost essential.

Mr. BARTLIT. I don't think Mr. DeLone wants a further charge on the purpose of the Sherman Act.

Mr. DELONE. I do not, nor did I request it, sir, any more than I want the indictment to go out to the jury. It seems to me that compounds what I took exception to in both instances, sir, and I am sorry.

The COURT. My problem is that I said when I used an ill-advised word—I used the word "unreasonable," which has nothing to do with this kind of a charge—I used the word "unreasonable inference," and it seems to me that has no place in this kind of a charge, because it doesn't have to be unreasonable here. I would have thought if anybody objected to that, it would have been Mr. Fricano.

[14,933] Mr. FRICANO. I cringed.

Mr. BARTLIT. I don't think anybody objected to the use of the word "unreasonable."

The COURT. But you can't correct it at this stage except by telling them again what I really meant.

Mr. BARTLIT. Maybe I can ask Mr. DeLone if he is objecting to the use of the word "unreasonable."

Mr. DELONE. I thought the thrust of it was the comments which followed about what I regard as philosophy behind the Sherman Act, which I didn't think was appropriate.

The COURT. The way I understood you to say that charge is inappropriate in view of the nature of the charge in this case, and what is inappropriate is the use of the word "unreasonable" and I agree with you. That is why I say I will restate it.

Mr. DELONE. I will withdraw the objection to that portion of Your Honor's charge, if I am precipitating that being recharged. I will withdraw that.

The COURT. That is the reason I am recharging it. I thought what you said was what I said was inappropriate in light of the indictment in this [14,934] case.

Mr. DELONE. I withdraw that objection.

The COURT. Does anyone else want to object as to the purpose behind the act? If they do, this is the time to say so.

[14,935] Mr. BARTLIT. Your Honor, I believe the emphasis on the free enterprise system was too heavy, but I don't believe that it can be cured by a recharge, and I don't ask for a recharge. That would be my sole position.

The COURT. All right.

Mr. BARTLIT. With regard to the indictment, Your Honor, neither can I see that any objection to a reiteration of the means and methods can possibly be cured by giving that to the jury. That just is a remedy that has nothing to do with the point at issue.

The COURT. Does it show how they fit in and, as I understand Mr. DeLone's objection, by reading those I unduly emphasized something by reading just those? I thought I had read the other part, too. But Mr. DeLone apparently thought I read the ways and means without reading everything else.

Mr. DELONE. Oh. Oh, I must have misspoken then, sir, if that was the impression I gave Your Honor.

We had from the early stages of this case—I thought it was really a ground rule—the indictment itself wasn't to be mentioned at length, dwelled on or quoted And I had understood it wouldn't go out to the jury. And then Your Honor quoted a page and a half in [14,936] addition to the part of your charge where you took the means and methods and subdivided them into four parts.

The COURT. Do you remember that I told Mr. Fricano that he wouldn't have had to set forth any ways and means?

Mr. DELONE. Yes.

The COURT. But having set forth ways and means he had to prove one or more of them.

Now, I can't place upon him the responsibility of proving one or more of the ways and means without telling the jury what the ways and means are. There is just no way to do that.

So, if I didn't read them——

Mr. DELONE. I'd rather not have the indictments go out, which I think gets us in another mess, sir. I will withdraw that objection.

The COURT. I don't want to coerce anybody into withdrawing things.

Mr. DELONE. The cure is worse than the disease, so I'd like to withdraw it, sir.

The COURT. Well, the other alternative would be to tell the jury to totally ignore ways and means, and that Mr. Fricano doesn't have to prove one or more of them.

I think in the fact that he put them in the [14,937] indictment he does.

Mr. DELONE. Well, actually I thought Your Honor, in the structure of your charge—and it is really just a point of emphasis—I don't know how we deal with these things. You read all of the means and methods, but then you subdivided them, you grouped them again.

The COURT. I said before I read them——

Mr. DELONE. And that's what I had understood in your earlier discussion and you had planned to do.

The COURT. I read them all because he has to prove one or more of them. Then I said I am going to try after I do it, I said it in the charge I am going to try after that to explain them to you to make them more understandable, and for that purpose I am going to group them.

Mr. DELONE. Rather than have the indictment go out——

The COURT. I don't want you to do that as a matter of compromise if you are convinced that what I did was wrong. I think you should preserve your objection.

Mr. DELONE. I think more harm would be done by the course Your Honor proposes, and therefore I [14,938] withdraw the objection.

Mr. BARTLIT. Finally, Your Honor, I don't know if Your Honor is going to recharge on the predatory practices or not. I am a little confused on that. I know that Your Honor said when you first read, and when you read again——

The COURT. Let me explain that, Mr. Bartlit.

The objection there was that I didn't say as a part of the predatory practice that there had to be proof of an agreement. Now I thought I did. I thought I said on the other hand efforts—and the efforts refers to the predatory, to my description of the meaning of predatory practice directed or focused against specific companies may be evidence that the alleged conspirators were seeking to raise, fix, maintain, and stabilize prices by curtailing or eliminating the competition of the companies.

Now I thought that what I was telling them was that unless there is an agreement to fix, maintain, and stabilize prices, and that the predatory practices are for that reason, it is nothing; but since I didn't say that apparently with sufficient clarity, that's exactly what I thought I meant.

Mr. BARTLIT. Well, the only thing, if Your Honor is going to charge again, then I would state [14,939] this: I would say that when Your Honor gave us your anticipated substance of charge a week ago, you said now with regard to Defendants 35, 36, and 37, which are on this subject, let's consider those, and at the end of the charge if you want to bring those up again, do it.

So, all I am saying is if you are going to charge again, then I would ask the court to look at 35, 36 and 37, as Your Honor

suggested a week ago, and give those. That's the only ones that were left open, as I understand it.

The COURT. Now, 35 I gave.

Mr. FRICANO. You gave 35, Your Honor.

Mr. BARTLIT. I think that's right, Judge.

The COURT. All right.

Mr. FRICANO. 36 comments on the evidence, and you said you wouldn't do that, Your Honor.

Mr. BARTLIT. No, it doesn't.

The COURT. But in effect I did say that. I said if anything is done independently is not a violation of the Act absent an agreement.

Mr. FRICANO. You did say that several times, sir.

Mr. BARTLIT. Well, all I was saying, Your Honor, is if you are going to instruct again on that 36, it seems to me is a key one.

[14,940] The COURT. 37 I gave specifically.

Mr. BARTLIT. I agree. I agree. I would just say, Your Honor, if you are going to instruct again, I would say that 36 be given as Your Honor mentioned a week ago.

Mr. FRICANO. If Your Honor please, I respectfully request if Your Honor is going to give his charge, give the charge he decided upon with the modification.

Mr. BARTLIT. Your Honor suggested that I raise this again, that's the reason I did it.

The COURT. Yes. And I am going to recharge on predatory conduct, because I have been in effect sort of pushed into the position of doing it. And I will state that, of course, if these things were done for independent commercial reasons, the predatory conduct then, without agreement, isn't illegal. I thought I had already said that.

Mr. FRICANO. You said that, Judge.

The COURT. I thought I had.

Mr. FRICANO. I heard it, Your Honor.

The COURT. But Mr. DeLone thought I hadn't, so we will say it again.

Mr. DELONE. I must not have made myself clear, sir. My concern was that you said in the course of that "competitive efforts against a particular [14,941] company may be evidence of agreement." That's what I understood Your Honor to say.

The COURT. Yes. And you are right. I am going leave off the word "competitive." That's what I said. That's why I am going to recharge it, because competitive efforts, there is nothing wrong with it. But efforts against specific companies may be such evidence, I agree with you, that I should not have put the word "competitive" in there, so I am going to take it out.

I agree with you, sir.

I ought to tell them that that wasn't right and I am going to restate it.

Mr. DELONE. That's all I am asking, sir.

The COURT. That's what you requested, and I am doing it.

[14,942] Mr. WARNKE. Your Honor, I have just one comment. Colon Brown would like the jury to know he does not have a chauffeur and Mr. Nicely wishes he had a gardener.

The COURT. I thought I said that. I will tell them that specifically. I thought that I made that clear as I could. I will tell them Mr. Brown does not have a chauffeur, except his wife.

Mr. FRICANO. If Your Honor pleases, there is a chauffeur behind him. He is a pilot right behind him.

AN UNIDENTIFIED VOICE. I am not a chauffeur.

The COURT. I didn't mean it as an inference Mr. Brown had a chauffeur and I don't know if Mr. Nicely had a gardener. I don't see anything particularly wrong with that, since I have one.

Bring in the jury.

Mr. MCSWEENEY. Do I understand, then, Your Honor will include number 36 then?

The COURT. In substance.

Mr. MCSWEENEY. Thank you.

Rich, in view of Mr. DeLone's voluntary withdrawal of that objection to my reading the ways and means, we will not have to send out the indictment.

Mr. DELONE. Thank you, sir.

[14,943] [Jury present.]

The COURT. Ladies and gentlemen, as I told you, that was the time when counsel tells me what I said wrong and what else they want me to say that I didn't say. They pointed out some things to me I think I did say wrong, so I will tell you what those were.

First of all, I want to tell you that I was merely giving an example when I talked about chauffeurs and gardeners and I want to inform you that Mr. Brown, Mr. Colon Brown, does not have a chauffeur. If you thought he had a chauffeur as a result of that, he doesn't have a chauffeur. And Mr. Nicely doesn't have a gardener. So in your consideration of the charge, please take it as a matter of construction that they don't, that neither one of them have that.

Now, also when I talked to you about sentencing being a matter for the Court, I used the word "consequences." Consequences referred only to the sentencing, not to anything else. There are no other consequences that I know of that you should consider or be concerned with. There is no evidence of any other consequences and I was referring to the fact of sentencing.

Also, when I talked about job protection lists and I said they were available to everybody, it is only United States Gypsum Company that had one with an accounting [14,944] firm and you heard about that and you heard such evidence as to the use that it was put to, that list. If the evidence indicates that any other corporations had job protection lists, you may consider that and find as you wish.

I want to say that in connection with verification either as to job protection arrangements or price, the Defendants contended there were two purposes, not just one. One purpose they contended for was that it was a defense to the Robinson-Patman Act. The other they contended was to avoid being defrauded. If they had any other contentions you heard them set forth by counsel. If counsel told you what their contentions are and they differed in any way from mine, they know what their contentions are better than I know what their contensions are, so you take their statements of the contention.

As to those two factors, there were at least two contentions, Robinson-Patman plus defrauding as to job price protection verification.

Also, when I talked to you about so-called predatory practices, that is the kind of practice that would be directed toward eliminating or curtailing—eliminating a competitor or curtailing or preventing him from doing certain things which he might be doing that somebody else didn't like, I made an incorrect statement. [14,945] I said on the other hand competitive efforts directed or focused against specific companies may be

evidence that the alleged conspirator corporations were seeking to price fix, maintain, stabilize prices by curtailing or eliminating competition of those companies. The word "competitive" should not have been there.

[14,946] The Court: What I intended to say was "efforts directed against specific companies to either put them out of business or make them stop certain practices, if that was done by agreement, and if you were satisfied beyond a reasonable doubt that one or more of these defendants, or one or more conspirators agreed to do that, to do that kind of thing, and it had that effect—that is, to raise, maintain, stabilize prices, raise, fix, maintain or stabilize prices, that that had that effect and there was an agreement between the parties that they were going to do that, then you may consider it in relationship to the conspiracy.

If there was no proof of an agreement to do that, then of course, you may not, because it isn't illegal. It isn't illegal at all to give price reductions or unloading allowances, or to include professional customers' services or take any other kind of marketing activity if it is done independently and not by agreement.

It only becomes illegal if it is done by agreement for the purpose of raising, fixing, maintaining, or stabilizing prices.

And, insofar as this section of the Sherman Act is concerned, you are not to concern yourselves with whether any agreement was reasonable, any restraint of trade was reasonable or unreasonable.

[14,947] If there was an agreement—as I have charged you—to raise, fix, maintain or stabilize prices, or prices, terms, or conditions of sale, that would be violation of the law whether reasonable or unreasonable. You are not to concern yourselves with the reasonableness.

Generally, is there anything else now that anybody wishes to raise?

Mr. McSweeney. Your Honor, just the housekeeping aspects.

The Court. I know.

I am talking about your objections or requests for additional charge to the extent that I said I would do it. Is there any objection to what I have just said?

Mr. WARNKE. No, Your Honor.
Mr. MELLOTT. No, Your Honor.
Mr. BARTLIT. No, sir.
The COURT. All right.
Mr. Fricano?
Mr. FRICANO. No. I am satisfied, Your Honor.
The COURT. Mr. Keck?
Mr. KECK. No, sir.
The COURT. Mr. McSweeney?
Mr. MCSWEENEY. No.
The COURT. Mr. Mellott?

[14,948] Mr. MELLOTT. As I said, Your Honor, I am satisfied.
The COURT. Mr. DeLone?
Mr. DELONE. No, sir.
The COURT. Mr. Bartlit?
Mr. BARTLIT. No objection, Your Honor.
The COURT. Mr. Warnke?
Mr. WARNKE. I have no objections, Your Honor.
The COURT. All right.

Now then, ladies and gentlemen, you have heard the charge of the Court.

It is about time for you to undertake your traditional responsibility of determining innocence or guilt.

I want to suggest to you that it isn't helpful for any juror at the outset of deliberations to state a dogmatic position one way or the other. It becomes more difficult to change your minds as you listen to the discussion with your fellow jurors.

You know, once we say something, pride steps in, and it becomes a little more difficult for people to change their minds after they have said so.

Even, you know, a judge too, after they have said something, pride steps in, and they find it difficult [14,949] to change what they have said.

I remind you that you are not partisans, you are judges. You are judges of the fact. And your sole interest here should be to ascertain the truth. And you will make a worthwhile contribution to the administration of justice when you arrive—if you arrive at a true verdict in this case.

Now, I suggest that when you retire you elect a foreman, elect one of your members as foreman, and elect a secretary.

And then undertake in a businesslike manner to determine the innocence or guilt of each defendant individually.

It is your duty now to consult with one another and to deliberate with a view toward reaching an agreement, if you can, without violence, to individual judgment.

Each of you must decide the case for yourself. I suggest that you do so after consideration in an impartial manner of all the evidence with your fellow jurors.

Don't hesitate to re-examine your own views or change those views if you are convinced that they are erroneous. But do not surrender your honest conviction as to the weight or effective evidence solely because of the opinion of fellow jurors, or for the purpose of reaching a verdict.

Now, I am going to send certain exhibits to you [14,950] which have been agreed upon by counsel so that you will have them in the jury room to look at.

Other exhibits, because of the voluminous nature of them, aren't going to the jury room. They will be here. And if you want to see them, if you give Mr. Keene a note I will consult with counsel and we will make other exhibits available to you.

There are some exhibits, on the other hand, that since they had some parts that I thought were all right and some parts I didn't, I permitted them to be read in part.

Now, of course, it would be fruitless to do that and then send out the exhibit with the whole thing in it. So those kind of exhibits will not be shown.

But if, since you won't maybe remember that, anything you want to see that you don't have, you make a note to Mr. Keene. I will look at it, and if there is any way I can give it to you without violating what I deem to be appropriate, I will do so.

Now, I suggest to you if you want to look at the Celotex or United States Gypsum exhibits, they are available to you, but we are going to keep them in the courtroom. Anything that you want to see that's here in the courtroom and too voluminous to take out, we will lock the courtroom and treat it as a jury room, and nobody will be with you, and you will be permitted to deliberate here or to look at [14,951] those things here. I prefer that you not deliberate in the courtroom itself.

[14,952] The COURT. Now you remember I have told you on numerous occasions that you must reach, treat each individual,

each Defendant corporation or individual separately. To help you do that, I have prepared for you a separate verdict slip as to each of the Defendants in this case and it says, "And now, to wit," and there is a place for the date. That is the date on which you reach a verdict. Whatever date you reach the verdict, your secretary fills in there.

We, the jurors find in the above captioned case the Defendant as to Count One

There is only one count. There is a line, and you write down guilty or not guilty. The first one I have happens to have in the order of the indictment, United States Gypsum Company, so you write down there either guilty or not guilty, as you find it.

Then, as I am sure you know, your verdict has to be unanimous. Each Defendant has to sign and there is—not each Defendant. Each juror. Each juror must sign the verdict slip indicating that is your verdict, and there is one here for each Defendant. The bailiff will have those with you, to give to you when he brings them out.

You will have in due course the exhibits to study and I have told you about any other exhibits that you wish.

[14,953] Now, we have two alternates. The twelve regular jurors, is anyone feeling weak or infirm? Is there any reason why you feel, if any of you feel there is any reason why you can't serve on this jury, I wish you would say so now. Otherwise, we will—I will, after you have left the room, I will excuse the two alternate jurors.

All right. Will the bailiffs come forward to be sworn.

[The bailiffs were sworn.]

The COURT. All right. Will you retire the jury, Mr. Keene. Here are the verdict slips. We will make available to you the exhibits.

[At 5:07 p.m. the jury was retired.]

The COURT. Not the alternates. The alternates stay there. I want to talk to them.

Now the two alternate jurors, I sort of feel guilty after having you sit here for all this period of time, to excuse you. You will understand that—you know originally there were four alternates and you will understand if something had happened to one of the regular jurors at this stage we might have had to try that all over again, try the case over again. So don't feel at all

that your time has been wasted. You served a commendable purpose. You did your duty as jurors, just as if you had retired for deliberation. So I want to thank you sincerely [14,954] for the kind attention, the sincere attention which you gave this Court and which you gave all the parties here. Your alertness and also, of course, I have noticed, too, you have all been here on time and this has been a fine jury and you certainly were among it.

There is one other thing I want to say. Until the jury has returned its verdict, if anybody asks you any questions, please do not talk to them. Don't tell them what your views are as to innocence or guilt. Don't tell them what any other jurors' views might be if you have any kind of idea what their views are. Don't tell them that. Don't discuss anything that occurred in the jury room or among jurors as part of your deliberations. In other words, just say—even after the jury verdict is in, you should not discuss anybody's view, who was for whom or who was for what, who you think was for who. There have been no deliberations, so far, as I understand it, but don't express any views as to what you think anybody else thinks.

If after all it is all over, and after the jury returns its verdict, you want to say what you think, you may do so, but I commend to you the policy of not doing it then.

I commend you with the thanks of the Court and return to your home and you will get your checks in the mail for your service. Thank you again for your devotion [14,955] to duty.

[The alternate jurors were excused.]

* * * * *

DISCUSSION

[14,981] Mr. HIERING. Your Honor, I strenuously object to that going to the jury. It is not in the same category as the Morgan memorandum. It contained, at length, expositions on the law. Your Honor at the time said that the portions dealing with questions of law should not be read to the jury.

The COURT. I remember this one. I don't want that to go out. That has all kinds of legal explanations which I disagree with, and I had enough trouble charging the jury on the law with all these learned counsel without getting that out.

Mr. DeLone. Maybe that is where I got my indoctrination. Maybe that is why we are having so much trouble.

The Court. That isn't helpful to anybody. That says a lot of things about what you can do and what you can't do, which I don't agree with.

Mr. Hiering. We don't have anything further, other than the ones that you have got there.

The Court. I have 16 and 19.

What is 19? That is one page.

Mr. Hiering. They are both legal opinion exhibits, Your Honor. They are Georgia-Pacific documents.

The Court. 19 is—GX 19 is a [14,982] Georgia-Pacific document.

Mr. Hiering. It passes a legal opinion on the Container case, Your Honor.

The Court. Well, I am going to rule out 19. They have heard enough about that.

Mr. Hiering. In the same category is——

The Court. 20. It won't hurt to send out 20. Nobody can read it. That is just a copy of that other one I already ruled on.

Mr. Hiering. Yes, Your Honor.

The Court. The only one I have left is GX 16. That is what?

Mr. Fricano. That is the Crowell memorandum, Your Honor. That is the one that we relied upon extensively. This is Mr. Crowell, the lawyer from Georgia-Pacific, who conducted a study of the pricing department at Georgia-Pacific once it acquired Bestwall, and it is a complete review of what he found and what he recommended to Mr. Hunt. He found in that they were making pricing contacts one to two times a day.

Furthermore, he stated in that that——

[Conference between the Judge and his Law Clerk.]

The Court. All right. The jury wants the portion where I charged on means and methods re-read to them. My problem with that is I don't yet have the [14,983] transcript, and I can't re-read it.

Mr. Burr. They are supposed to go to dinner at 6:00.

The Court. And I won't have it at 8:00, either.

Mr. Fricano. How about furnishing them with the indictment?

The Court. That is not what they asked for. They asked for the section where I combined them into groups, and the indictment didn't do that.

Mr. Fricano. I didn't understand the Court, then.

The Court. Bring the jury in. I will explain to them that I will be happy to do that, but it can't be done until the Reporter has transcribed that section of the charge.

Mr. Fricano. Shall I continue with my——

The Court. He is going to bring in the jury right now.

Mr. Fricano. Well——

The Court. I will read GX 16 and discuss that tomorrow.

Mr. Mellott. If Your Honor please, while——

[14,984] The Court. I have got a little housekeeping duty to do.

Would you tell my secretary to call my wife and tell her, as is quite obvious, that I will be late for dinner, but I will be there, and to not lose faith.

Mr. Mellott. Well, I don't believe that GX 16 should be sent out to the jury because——

The Court. Bring in the jury. Are they bringing them in?

Mr. Mellott. ——it concerns a discussion of the law. If Your Honor does decide to do it, I would request also that GX 17 go, and I would ask you to look at both of them at the same time. I do not believe that 16 should go, but if you decide it should——

The Court. I don't know what 16 is now. I haven't read it. It is a document of some 27 pages, so I will have to read it before I can pass on it. I will take 17, too, and we will see.

[The jury enters the courtroom.]

The Court. Ladies and gentlemen of the jury, you sort of caught me short. You want me to re-read to you a portion of the charge. Now, I have notes, but I didn't use that precise language in charging you. So, until the Court Reporter who took the charge has made a transcript of it, there is no way for me to read it. I will [14,985] have that charge tomorrow, and I will be happy, at that time, to read that section to you again at that time, when I have the charge—you know, the transcript of the charge, to read back to you that section, or, if you deem it appropriate, any other section. But there is just no way to do it tonight.

Does that prevent you from going ahead with your deliberations tonight? If it does, well, we will send you to dinner and up to the hotel.

JUROR No. 8: We can try it without it.

The COURT. All right. Try to see—go as far as you can. If you find that you are unable to deliberate, why, tell Mr. Keene, Mr. Keene or the marshal, one of the marshals, and, if the jury indicates that they want to wait until tomorrow morning until I can read part of the charge to them before they deliberate further, just terminate the deliberation and take them to the hotel for the night.

All right?

Mr. KEENE. Yes, sir.

The COURT. Is there any objection? Okay. Fine.

[The jury retires from the courtroom.]

[15,003] * * *

The COURT. Ladies and gentlemen of the jury, I understand that you have requested that [15,004] certain additional, certain parts of my charge be reread, is that correct?

Have you elected a foreman?

You are the foreman, sir?

JUROR No. 8. Yes.

The COURT. It is my understanding, and I am asking you as spokesman for the group, you want me to reread that section of my charge where I discussed manner and means of carrying out a conspiracy, if there was one, is that correct?

JUROR No. 8. With the four categories.

The COURT. Do you desire to hear the thirteen manners and means that were included in the charge or not?

JUROR No. 8. Yes.

The COURT. Now I charged this—remember, I had already previously charged that there must have been an agreement, and you will recall, that was reached and there must also be proof that each individual joined into that conspiracy and the conditions which must have been proved beyond a reasonable doubt before you could get into that.

I am not going to repeat all those. You have not requested that and it would be lengthy.

I said this:

[15,00] In formulating and effectuating the aforesaid combination and conspiracy, the indictment charges that

the Defendants and co-conspirators did, among other things, the following:

A, agreed to raise the prices of gypsum board.

B, agreed to the terms and conditions of sale of gypsum board.

C, published price lists and terms and conditions of sale in accordance with the agreements reached.

D, agreed to maintain published prices and conditions of sale of gypsum board.

E, agreed to maintain job price protection lists and to discuss and exchange data set forth therein in order to insure the maintenance of published prices of gypsum board.

F, agreed at meetings of the Gypsum Association, over the telephone, by mail, to adopt uniform methods of packaging or handling gypsum board.

G, agreed to adopt uniform methods of delivery for gypsum board.

H, telephoned or otherwise contacted one another to exchange and discuss current and future published or market prices and published or standard terms and conditions of sale and to ascertain alleged deviations therefrom.

[15,006] I, telephoned or otherwise contacted one another to ascertain alleged deviations from other uniform practices and policies concerning sale of gypsum board, including, but not limited to, job price protection, boundaries of price zones, methods of delivery, points of delivery and packaging and handling.

J, agreed not to undercut gypsum board prices which were ascertained from one another as the actual selling or offered prices to purchasers of gypsum board.

K, agreed not to give a greater cash discount or more generous terms of sale than those ascertained from one another as the discounts or terms being granted or offered to purchasers of gypsum board.

L, agreed not to deviate from standard uniform practices and policies in the sale of gypsum board, except to the extent deviations from such practices and policies were ascertained from one another.

M, engaged in predatory practices designed to eliminate or otherwise contain the competition generated from time to time by certain producers of gypsum board.

Then we had a recess, if you will recall. After the recess I said—I told you this:

[15,007] The COURT. Now, the indictment which I read to you—I told you what was in it—alleges some 13 means and methods by which the Defendants and others are claimed to have formulated and effectuated the combination and conspiracy.

The Government is not required to prove all 13 means and methods were agreed upon to carry out the alleged conspiracy, nor need it prove that all 13 were actually used or put into operation.

Even if you should find that the alleged conspirators or some of them took most or all of the actions characterized in the indictment as methods or means, this alone would not justify a conviction, unless you find that one or more of such actions were taken within the statutory period pursuant to and for purposes of effectuating the conspiracy charged in the indictment.

The core of the matter is the alleged conspiracy. And the question under the ways and means section of the indictment is whether any or all of these actions were taken because of and for the objectives of such a conspiracy.

Instead of going through each of these alleged means and methods, one by one, I have grouped them into categories.

If I said "matter and means," I meant means and methods. I have grouped them into categories. After [15,008] summarizing each category, I will give you some instructions on the legal principles applicable to each and on some of the factors you should consider in applying them.

The first four of these means or methods relate to the prices and materials and conditions of sale of gypsum board.

In summary, they allege that the defendants and other coconspirators agreed to increase the price of gypsum board and agreed to the terms and conditions of the sales, that they published price lists in conformity with these alleged agreements, and agreed to maintain the published prices and terms.

As with the basic charge in the indictment, the central and controlling element here is the element of agreement. It is not

a violation of the Sherman Act for competitors to adopt substantially similar or even identical prices or terms of sale of another competitor, unles that is done pursuant to an agreement such as the indictment charges in this case.

I guess I could sum it up by saying Macy's can't tell Gimbels; but, if Macy's wants to follow Gimbels and charge the same prices Gimbels do, there is nothing wrong with that, unless there is an agreement to do that. The agreement is the crux of the violation. Identical prices or price changes among competitors are not, in themselves [15,009] sufficient proof of conspiracy. Such identity commonly results from the forces of supply and demand operating upon independent sellers in the market. This is particularly so where goods are fungible; that is, one kind of goods is exactly the same as some other kind of goods. A product where both elements are the same or a product doesn't differ from company to company couldn't sell if they didn't sell at the same price. So the law of supply and demand requires that.

However, that is not an offense unless there is a conspiracy to do that.

The Sherman Act is not violated if the ordinary forces in the market of competition make prices the same.

I suppose—I don't know, but I suppose that everybody charges the same for chewing gum; one pack of chewing gum, let's say, costs the same as another pack of chewing gum. Nothing wrong with that, unless the manufacturers of chewing gum get together and say, "Let's charge the same price." They don't have to get together and do it. They can have an agreement by implication, as well as by express language.

There can be expressed agreements, or there can be implied agreements, and agreements can be implied from the nature of conduct, as well as from the words actually used.

[15,010] Uniform prices, however, whether list prices or transaction prices, particularly where they appear to be unrelated to supply and demand or to other economic factors, may be considered by you as some evidence from which an agreement or understanding to restrain trade may be inferred.

The next asserted means and method in the indictment refers to job protection. It asserts that the alleged conspirators agreed to maintain job price protection lists and to discuss and ex-

change data set forth therein, in order to insure the maintenance of published prices of gypsum board.

The defendants have asserted that such exchanges of information with respect to alleged offerings of alleged job price protection were made in order to prevent them from being defrauded by certain of their customers, who claimed untruthfully that a competitor had offered job price protection when he had not.

The Government charges that the preparation, use, and exchange of job price protection lists was pursuant to an agreement to raise, fix, maintain, and stabilize prices.

The question is one for you and you alone to determine, under all the facts and circumstances, in accordance with the law, as I gave you. You must determine what was the purpose of the job protection list. Was it for the purpose that the defendants state, to avoid somebody [15,011] telling them that there was job protection when there was not, and thus to work a fraud on them? Or was it for the purpose the Government states, to raise, fix, maintain, and stabilize prices in this manner?

This is a question that you are going to have to decide from all the evidence in the case.

The next group of means and methods asserts, in substance, that the defendants and alleged co-conspirators exchanged price and other competitive information with each other and that the information was given and received in order to raise, fix, maintain, and stabilize list prices in the gypsum industry.

As I understand the situation—again, this is for you and not for me—but, as I understand it, the defendants do not dispute the fact that they did exchange price and other competitive information among themselves and with each other and with others. However, they say there was no agreement to do so, and they say that the purpose of such exchange of competitive information, which they call verification, was to fix, raise, maintain, and stabilize prices, in violation of the Sherman Act . . .

Mr. KECK. Your Honor, you misread. You left out a "not."

The COURT. However, they say there was no agreement to do so, and they say that the purpose [15,012] of such exchange of competitive information, which they call verification, was not to fix, raise, maintain, and stabilize prices, in violation of the Sherman Act, but, rather, they claim the purpose is solely

to insure their compliance with another antitrust law known as the Robinson-Patman Act.

Now, you have heard a good bit about the Robinson-Patman Act in this case. However, in order for you to be able to assess the opposing contentions of the parties and the evidence you have heard on this case, I am going to restate parts of that Act to you. I will then explain what the provisions of the law mean for the purposes of this case and how you are to weigh and consider the evidence relating to this document.

The document, I presume, should have been for the purpose of this case; but I read it as I gave it.

So far as it concerns us here, the Robinson-Patman Act provides that it is unlawful for the seller of a commodity to discriminate in price between different purchasers of that commodity, where the effect of such discrimination may be substantially to lessen competition or to injure, destroy, or prevent competition with customers of the seller who grant the discrimination in price.

What this means is that, where a seller has two customers which compete in the same market—for example, [15,013] two lumber yards in the same vicinity—the seller may not sell to one of them at a lower price than it sells to the other, for the effect of such price discrimination would be to tend to injure the unfavored customer in his efforts to compete with the favored customer.

The Robinson-Patman Act does provide certain justifications or defenses which are available to a seller who chooses to discriminate in price between two of its competing customers.

Among these is the good faith method of meeting—good faith meeting of competition defense. If a seller chooses to discriminate in price between two of his customers and then is charged with violating the Robinson-Patman Act, that Act provides that he may defend against this charge, and I quote,

> By showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price to a competitor, or the services or facilities furnished by a competitor.

What this means is that a seller's lower price to one of his customers in the market is not a violation of the Robinson-

Patman Act if the seller can show that he charged that lower price because he believed, in good faith, that [15,014] one of his customers had charged or offered that lower price to that particular customer.

Mr. MELLOTT. Your Honor, I believe you read "competitors" as "customers." "One of his competitors had charged."

The COURT. ——one of his competitors had charged or offered that lower price to that particular customer.

Now, the Act does not specify any particular method a seller must use to establish his good faith in charging a lower price to a customer in order to meet a competitor's price.

What the law does require of such a seller is that he have facts available to him, at the time, which would lead a reasonable and prudent person to believe that the lower competitive price existed.

The defendants contend that they exchanged such information or verified solely for the purposes of insuring that, if they made a sale at a lower price to a particular customer to meet the reported lower price or offer of a competitor, they would be able to establish that the—if the question were ever raised—their good faith in lowering their price to that customer.

The Government contends, on the contrary, that the defendants and others engaged in this practice pursuant [15,015] to an agreement, mutual understanding.

The Government asserts that the defendants' purpose was not merely to establish—The Government asserts that the defendants' purpose was not merely to establish good faith under the Robinson-Patman Act, but that they exchanged competitive information for the purpose of raising, fixing, maintaining, and stabilizing prices.

It will be up to you, members of the jury, to resolve these issues.

First, you must determine whether there was an agreement, express or implied, to engage in the practice of price checking or verification. In other words, you will have to decide whether, if one person called the other and asked about prices, and that one told him and then the other called back, and the same thing resulted—whether or not that amounts to an implied agreement to do just that, to tell each other whether or not the price that they were informed had been offered was, in fact, offered. Does this constitute, in effect, an implied agreement to do that?

[15,016] Now, what is an implied agreement?

We all make those, every day of our life, all the time. Somebody comes and offers you a certain service, and you say, "Go ahead and do it;" and then he comes and tells you the price—he might have told you price first, or he might not. You may have said, "Yes, I agree with you, you should perform the services, and I will pay you for doing it." This is an implied sort of thing. So, if a young man comes up and says he wants to cut your grass, and you say, "Go ahead," there is an implied agreement. Now, you have agreed, in effect, that he should cut your grass, and there is an implied agreement, then, that you are going to pay him for it.

So you have to decide, did that happen here or didn't it?

In deciding this issue, you must follow the instructions concerning what the Government must prove to establish the existence of a mutual understanding or agreement between or among competitors.

Secondly, you must determine whether the purpose for the exchange of competitive information between the Defendants and their alleged co-conspirators was to insure a good faith meeting of competition, as a defense to the Robinson-Patman Act.

If you decide that, if you decide this was merely [15,017] done in a good faith effort to comply with the Robinson-Patman Act, then you could not consider verification, standing alone, as establishing an agreement to fix, raise, maintain, and stabilize prices as charged.

However, if you decide that the effect of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these changes as evidence of the mutual agreement or understanding alleged in the indictment to raise, fix, maintain, and stabilize list prices.

As I will explain to you in greater detail, if you find that the purpose of an agreement to exchange price information was to raise, fix, and maintain or stabilize prices, then it does not matter whether or not the agreement was successful.

You see, a conspiracy to fix prices doesn't have to be successful to be unlawful, if there was such a thing. If the effect of such exchanges was to raise, fix, maintain or stabilize prices, then an agreement to engage in such an exchange is a violation of the Sherman Act, regardless of the specific purpose that the parties

to the agreement had in their minds. That is because the Sherman Act does not require proof of a specific purpose to restrain trade in order to establish the offense.

The law presumes that a person intends the [15,018] necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.

Another group of means and methods relating to the elimination or curtailment of certain methods of packaging and handling of gypsum board by the alleged conspirator companies—this is another group of means and methods which is charged for you.

As I have already instructed you, there is nothing illegal in the Defendants having identical conditions of sale, such as shipping wallboard on pallets or not shipping wallboard on pallets; nor is it illegal for one Defendant to stop shipping on pallets and then for the others to stop using them. Absent an agreement to do so, for the purpose and absent an agreement to do so, which has the effect of raising, fixing, maintaining, and stabilizing prices, such facts would not constitute—would not establish a conspiracy in violation of the Sherman Act as charged.

If you should find that an agreement on the methods of material handling did exist, and continued after December 27, 1968, nevertheless, you may not convict a Defendant unless you further find that the effect of that agreement was to raise, fix, maintain, and stabilize prices [15,019] of gypsum board.

Standing alone, a mere agreement on materials handling—for example, an agreement to eliminate pallets—even if the effect of it was to increase the profits of the agreeing Defendant, is not illegal, unless you find that such agreement went beyond materials handling and had the further purpose and effect of raising, fixing, maintaining, or stabilizing the price of gypsum board.

Therefore, if any agreement concerning materials handling prices did not have that effect, it must be disregarded and could not be considered.

Now, you heard the evidence on this matter. You heard the arguments of counsel on this matter. You have to decide, was

there such an agreement, and, if so, did it have the effect of raising, fixing, maintaining and stabilizing prices?

That is the decision which must be reached in regard to material handling.

I say, a mere argeement to eliminate pallets or sleuters or whatever it is we were talking about is not a violation, unless it had the effect of raising, fixing, maintaining, and stabilizng prices and there was an agreement to do the thing that was done—to eliminate the pallets, for example.

Another means and method the indictment mentions is the [15,020] charge that the alleged conspirators engaged in predatory conduct.

Now, predatory conduct, as we use it here, is conduct designed to eliminate or curtail the competition of others.

In this case, we are considering, in that regard, the competition generated by certain single-plant producers.

Now, what is it we are talking about by this? "Predatory" is a harsh word. I guess the word itself means something like you go out and eat people or something, I don't know; but that is not what we are talking about here.

The charge of the Government, as I understand it, is that there were certain—remember, it is your understanding that counts, not mine. As I understand what they are saying, they are saying that, insofar as the certain single-plant producers were concerned, the Defendants, by agreement, adopted means to either make them get into line or put them out of business. That is the charge, as I understand it.

Now, you have to understand that the word, "predatory," is a conclusory sort of word, and it doesn't prove that anybody's conduct in this case was, in fact, predatory. Merely calling in the name doesn't do it. You must assess the facts and make that sort of conclusion if you find that the evidence warrants it.

The evidence of the predatory conduct, you will [15,021] recall, relates primarily to alleged conduct agreed upon toward and directed toward the Texas Gypsum Company and the Republic Gypsum Company.

[15,022] The COURT. In assessing the evidence relating to this topic, remember that competitors are supposed to compete; and no competitor, whether it is a single or multi-plant producer, a

newcomer or an oldtimer, can rightfully expect that he can sell his products without others in the same business competing with him for sales.

On the other hand—I used the word "competitive efforts." I later charged that should not have been there.

On the other hand, efforts directed or focused against specific companies may be evidence that the alleged conspirators were seeking to fix, raise, maintain and stabilize prices by curtailing or eliminating the competition of these companies.

Consider, on this question, the extent to which the single plant producers appeared to depart from or conform to the normal practices and policies of the industry.

Consider the evidence concerning the levels of prices in the market in which the single plant producers operated and the levels of prices in other markets.

Attempt to determine whether any differences you find in these price levels are attributable to different conditions in the various markets, including such [15,023] factors as cost, demand, supply, the number of competitors in a given market, and any other factors which might naturally bear on or influence price levels in the particular markets.

Ask yourselves whether any price moves by the Defendants in the primary markets of the single-plant producers appear, from the evidence, to have been made on a selected basis, bearing in mind that there is nothing intrinsically illegal about charging different prices in different markets.

As usual, and as I have been reminding you on each of these claims, means and methods, the question for you to determine is whether the evidence you have heard respecting the single-plant producers reflects the existen e of the conspiracy, the absence of the conspiracy, or nothing either way.

Now, I later, after I asked counsel whether they had any objection to anything, gave you certain additional charges. You will recall that when I gave you the additional charge I pointed out that as to both job price protection and the job protection price list, the Defendants raised two contentions, not just the Robinson-Patman defense as to the verification, but also the defrauding defense. And they did the same thing with the price protection list, they raised two contentions. [15,024] They said they did it for two purposes, in protecting themselves against

possible fraud by a customer who misrepresented either prices or job protection, and also as a defense in the Robinson-Patman Act.

When I charged the predatory practices, you will recall I eliminated the word "competitive," which I have done now when I read the regular charge to you.

[15,025] The COURT. Now, I gave, also, the additional charge that, if there is no proof of an agreement as to—I don't know why I gave the additional charge, because I had already charged it—but I gave the additional charge, if there is no approval or agreement as to the price verification charge or the job price protection charges or the engaging in predatory practices, then, of course, these things would not constitute a violation of the Sherman Act.

I charged that the essence of it all was an agreement to do these things, and there is no conspiracy without an agreement.

Does that comply with the request of the jury?

JUROR No. 8. Yes.

The COURT. All right.

Will you retire the jury?

[The jury retired from the courtroom.]

• • • • •

[15,033] The COURT. And I understand you want to make a motion for mistrial?

Mr. BARTLIT. Well, Your Honor, I made a motion for mistrial yesterday and it was denied. All I wanted to do was to put my reasons on the record.

The COURT. All right. Now, are you conscientious about a mistrial?Do you want a mistrial?

Mr. BARTLIT. Yes, sir.

The COURT. Do you want Mr. Watt severed? And if I grant it, how soon will you be prepared to start again?

Mr. BARTLIT. Well, I start trial August 20.

The COURT. For how long?

Mr. BARTLIT. About three months. I start January 1 for General Motors for three months.

The COURT. Then Mr. Watt will probably have to have other counsel because I wouldn't want to wait that long.

Mr. BARTLIT. Well, I would get rid of my other obligations, Judge.

The COURT. Now, I want you to be sure that when you make the motion that you are not playing games with me. If you are conscientious and sincere and want on Mr. Watt's behalf to go through this again, put [15,034] your reasons on the record.

Mr. BARTLIT. Well, let me consult with him. I know my position, Your Honor, and I want to make sure that I have his position.

The COURT. It is up to you.

[Discussion held off the record.]

Mr. BARTLIT. Yes, Your Honor, we are very serious.

The COURT. You put your reasons on the record.

Mr. BARTLIT. Yes, sir.

These reasons are based on the final argument of Government counsel. And I have cited the Newman case. There are many other cases like the Newman case, and I won't go into the law, the Court is well aware of the law. The Court is well aware of the greater responsibility that there is on the shoulders of a U.S. Attorney in a case like this.

I would first like to talk about misstatements of fact in the record—and the record is loaded with these. I have pulled out these. If the Court wants more, I can produce them.

Number 1, Mr. Fricano said yesterday that when the statutory period arrived we had argued that Mr. Watt and U.S. Gypsum stopped verification. And Mr. Fricano [15,035] said, "Watt took it unto himself, went underground." There isn't any evidence, Your Honor, not a scrap, on which the Government can argue that Mr. Watt went underground and secretly verified in the statutory period. That's a very inflammatory statement, and it is not supported by the record.

Second. With regard to Document—I believe it is 121—Mr. Fricano said that the two men, Anderberg and Lane, asked Watt to discuss Pabco trucking with Pabco. Your Honor's own remark, you told the jury that there wasn't any evidence that Mr. Watt knew anything about that, it is just an unsupported assertion in an important area of the case.

Next, Mr. Fricano said that Mr. Bartlit mentioned fire-rated board, and then he proceeded to argue something about fire-rated board expense accounts.

Your Honor, the record shows that I never mentioned fire-rated board, that the Government went beyond fair rebuttal and went beyond the record. Moreover, with regard to fire-rated board, the Government said that Mr. Hunt and Mr. Watt discussed the fire-rated increase. No evidence of that at all, Your Honor. None. Going beyond the record.

Next. With regard to sales costs. There is no evidence that $25 is below San Antonio cost that I know of. That's Dallas cost. And in Dallas they sold at $26. And [15,036] San Antonio is closer to the plant and cost is lower.

Next. Mr. Fricano repeatedly said that the 1965 price increase stuck in the fact of the evidence that his own expert came up with that the company lost one-sixth of its market share during that period of time and lost another fifth in October 1967.

Next. Mr. Fricano said that a U. S. Gypsum Company official, Mr. Snell, was counsel, at the same time he worked for U.S.G. he was counsel for the Trade Association. I don't think that's a fact, Your Honor. I have searched the record, and I don't believe that's the fact that he worked for U.S. Gypsum and was counsel for the Gypsum Association at the same time.

[15,037] Mr. BARTLIT. Next. Your Honor, I think that the comments on espionage and sabotage were inflammatory and were not supported by the record. I think that the statement that I mentioned sabotage and then passed. . .

[Discussion held off the record.]

Mr. BARTLIT. Mr. Fricano said that I mentioned sabotage and then passed on to something else. The record shows that I said there was trouble with the plants, and then I said Mr. Watt wasn't even there during that period of time. He made it look like I was arguing something about sabotage when the record shows, and the evidence shows, that Mr. Watt wasn't there at that period of time.

Fourth. Mr. Fricano argued that the Defendants, including Mr. Watt, didn't call witnesses like Herbert and Walter.

Your Honor, there is no burden on us to call anybody. Mr. Watt is an individual; and for the prosecutor to argue that Mr. Watt should have called Mr. Herbert, whom he knows pled no contest, and expose himself to that risk, goes far beyond the realm of reasonableness, Your Honor.

Finally. Your Honor, in the opening argument—That was all in rebuttal and I had no chance to respond to [15,038] any of those things, and they were beyond the record and not supported by the record, as I understand it.

In Mr. Fricano's opening he made three or four statements which were baldly unsupported by the facts. I argued those to the jury. I had a chance to respond, Your Honor. But I still believe that his presentation was much more effective than mine could be under the circumstances.

For example, they are in the record. For example, he said that when I had that piece of fiberglass up there and was explaining why the meeting of Walter took place, I had in my pocket a document in Mr. Watt's handwrting showing that—dated prior to November 17—showing that Watt had talked to Walter. That was false, Your Honor, and I believe Mr. Fricano—I have to say he is probably mistaken, but he said it. And he hammered on it, and he emphasized it, and it was a misstatement of fact on a crucial point, and it imputed mv integrity and Mr. Watt's integrity.

Also, Your Honor, with regard to the testimony of witnesses Simpson, Van Cleve, and Meyer, I believe that the record in no way supported the—Freudian slip—the arguments of Mr. Fricano with regard to those witnesses. And Your Honor, we are now at the point where what I'd like to do, I prepared four charts which I wanted to introduce to refute those misstatements of fact. I have [15,039] marked those four charts as Defendant Watt Final Argument Demonstrative Exhibits 1 through 4, and would like them—They are over there. They are marked, and I would like them in the record. They obviously don't go to the jury, but I think that I could have effectively refuted the statements Mr. Fricano made which were not supported by the record if I could have used those. And I move to have those made part of the record, Your Honor.

The Court. All right. They will be turned over to the custody of the clerk. And if it should become appropriate, and if an Appellate Court wants to use those for review purposes, they will be available for the purpose. I assume that's why you want it done?

Mr. Bartlit. Yes, sir.

The Court. All right. The clerk will put them with all 'he rest of the exhibits to keep in case there is an Appellate review.

Mr. Bartlit. Second, Your Honor, on the prejudicial statements which went far outside the record, was a statement by Mr. Fricano that the case would have been dismissed if the Defendants had not received a fair trial.

We argued that Mr. Fricano's use of prejudice was not fair. Mr. Fricano argued that. In essence, he told the jury that Your Honor had ruled that that was all okay, [15,040] otherwise the case would have been thrown out. And I think the authorities are loaded with cases saying that that kind of a statement is as improper as a statement such as "We wouldn't even be here if there wasn't enough case to be here."—which is a statement made by some prosecutors from time to time.

Your Honor, Mr. Fricano, I think, made two prejudicial statements of the law.

One, he argued that it was predatory because U.S. Gypsum matched major competitors in the Southwest. He cited 15 or so incidents where U.S. Gypsum had dropped its price to match a major competitor, and said that under the law that was predatory. I think that's a plainly false statement of the law. I can't recall—I don't believe that was corrected by Your Honor's instruction. I wouldn't have expected it to be, because it is so far out in left field.

[15,041] Mr. Bartlit. Well, Your Honor, I think that is—those are the major points. They do not relate to—I emphasize this—to Your Honor's instructions. They relate to the argument, particularly rebuttal argument made by the Government prosecutor at a time when I had no chance to respond.

The Court. I don't think anybody requested a chance for surrebuttal. I had indicated, if it were appropriate, I would grant surrebuttal. Nobody requested it.

Mr. Bartlit. Well, Your Honor, I don't recall that statement. I never dreamed——

The Court. It is in the record. I said if surrebuttal was appropriate, I would grant it, and I indicated that on various occasions when people made objections. I said, "That is proper for rebuttal; not for an objection." Despite that, nobody asked for surrebuttal.

It is too late, now, to complain about it. The jury is deliberating. But I gave everybody, clearly, the opportunity, and I said it in the record and nobody availed themselves of it.

Mr. BARTLIT. I would say this Your Honor. I would make two points. Number one, if I am wrong, I am wrong. I wasn't aware of that opportunity. I didn't know that anybody ever got rebuttal in a criminal case.

[15,042] The COURT. I said it in this case, so, if you didn't know it, you would have heard. I said it.

Mr. BARTLIT. I said, if I am wrong, I am wrong. I didn't hear it.

The COURT. I said it in the opening, when I discussed the procedure. I said, "Mr. Fricano will be entitled to rebuttal. If he goes beyond what is appropriate rebuttal, there will be surrebuttal." And not a single counsel said anything to me about wanting surrebuttal.

Mr. FRICANO. In addition, Your Honor, Your Honor mentioned it off the record several times in chambers, with both sides present.

The COURT. I said it on numerous occasions.

Mr. BARTLIT. I would say this, Your Honor. Mr. Fricano baldly misstated the facts, and Newman says, "When a prosecutor misstates facts in his closing remarks or states facts outside of the record in such a way as to prejudice a defendant, a new trial is required. Where the prejudice is substantial, cautionary instructions will not preclude reversal."

The COURT. I don't know, but, if he misstated the record, I said they would have surrebuttal and could argue that to the jury. Nobody asked for it. I don't think you can roll the dice and complain when you come [15,043] up with craps.

Mr. BARTLIT. Your Honor, I didn't intend to roll the dice. [15,044] The COURT. You did. You didn't ask for surrebuttal. Instead, what you did was something that I felt was improper. You attempted to do it by the form of your objection.

Mr. BARTLIT. Your Honor, I, Fred Bartlit, never, in my objection, said the record said this. I stood up and said, "That misstates the record," and sat down. I was very careful.

The COURT. I think I told you on one occasion, and I told Mr.McSweeney on another occasion, "Gentlemen, that is not a proper way to make an objection."

Mr. BARTLIT. All I did was say, "I object."

The COURT. You said, "What Mr. Fricano said misstates the record."

Mr. BARTLIT. I said, "That misstates the record." I did not state what the record said.

The COURT. But you didn't ask for surrebuttal.

Mr. BARTLIT. I understand that, and I did not.

The COURT. Mr. Spradlin, do you join in the request?

Mr. SPRADLIN. Could we have time, Your Honor, to discuss this in the conference room as to [15,045] Mr. DeLone or any other counsel?

The COURT. Mr. Keck, on behalf of United States Gypsum, do you join in the request?

Mr. KECK. I do not join in the request for a motion for mistrial.

I did understand, from something Your Honor said, that, yesterday, we could put on the record today the places of the misstatements, and I would like, personally, to do that, on the basis of exception, and I am prepared to do that, because I, too, feel that Mr. Fricano, under the Newman and some other cases, clearly misstated the record in——

The COURT. You want to put it on the record; but you do not want to request a mistrial?

Mr. KECK. I do not.

The COURT. Do the—Mr. Mellott, do you join in the request?

Mr. MELLOTT. No, I do not, Your Honor.

The COURT. Mr. DeLone, do you join in the request?

Mr. MCSWEENEY. Yes.

The COURT. Mr. DeLone, do you join in the request?

Mr. DELONE. Yes, but I would like to add to the specification of prosecutorial statements [15,046] that is why I indicated, yesterday, when Mr. Bartlit had an opportunity, I would like to have an opportunity, also.

The COURT. All right. I am going to give Mr. Keck, now, and then you a chance to put on the record whatever you want.

Now, how do you want to handle your discussion with your client?

Mr. SPRADLIN. Your Honor, I would like to adjourn either across the hall or to the hall or, if Your Honor graciously furnishes——

The COURT. Do you want to hear what the other counsel say?

Mr. SPRADLIN. I would like to discuss it with my client and counsel for National Gypsum.

The COURT. Do you want to discuss it with National Gypsum at the same time?

Mr. SPRADLIN. I do, Your Honor. I think it would be appropriate.

The COURT. You can do it. It would strike me as unusual, but you can do it if you want to.

All right, Mr. Keck. Put yours on the record, if you will.

Mr. KECK. Mr. Fricano—and I am doing this on the basis of exception, and I understand this is my first opportunity to do this.

[15,047] The COURT. You don't mean exception, do you? Objection.

Mr. KECK. Well, objection to the procedure that was followed.

The COURT. Exceptions, in our court, are automatic. If you want to object to what was said, that is perfectly proper.

Mr. KECK. Yes, I do.

The COURT. Go ahead.

Mr. KECK. First, Mr. Fricano asserted in 21 instances, in 1970, U.S. Gypsum met competition in San Antonio on half-inch gypsum board at $25, which he claimed was contrary to my statement that USG would not go below its cost of meeting competition during the 1970 price war, which $25 he asserted was predatory and inconsistent, also, with Mr. Busch's testimony.

Now, in so doing, he deliberately misstated the record in these respects.

My statement, at page 4,144 to 45, related to U.S. Gypsum Exhibits 1,076 and 1,074 and expressly so stated: "We do, in fact, state that USG did not go below its costs in meeting competition during the 1970 price war."

Next, Mr. Fricano's 20-odd instances referred, on their face, to San Antonio, as he stated on page 14,760; whereas the Busch testimony related to U.S. Gypsum's [15,048] cost being $46 in—and I quote—"the northeastern part of Texas," end quote. He said that at page 8620. And Mr. Fricano's statement that U.S. Gypsum's meeting competition in San Antonio at $25 was below USG's costs and therefore predatory is directly contrary to the Weidman testimony at page 9334.

Second, Mr. Fricano asserted that trucking in Pittsburgh in 1962 or '63 was because of a rail strike, as Mr. Camel had testified.

Camel testified—9471—that USG had first started shipping by truck in the Pittsburgh market in those years when there was a rail strike, but had been shipping by truck ever since.

Third, Mr. Fricano, argued that sheathing prices went up because no single-plant producer competed as to sheathing. He said that at record 14,771 and 72. That statement was directly contrary to his own Exhibit GX 1595, a Republic Gypsum price list of May, 1970, which published a $42 price for M square feet on half-inch sheathing.

Next, Mr. Fricano argued, at record 14,796, that Mr. Snell was a lawyer for the Gypsum Association, and I am quoting, "was also the official in USG, the lawyer for USG, not Mr. Keck's office," and that "It wasn't until later that he went to Mr. Keck's law firm," end quote. This is [15,049] directly contrary to the stipulated facts as shown in GX 7 and Mr. Abnee's testimony at 1,207.

Last, at record 14,703, Mr. Fricano referred to the testimony of Mr. Busch in response to Fricano's questions regarding checking out competitive situations in 1966 and 1967.

In his rebuttal, Fricano quoted Busch as saying, and I quote, "That would be stupid, because we weren't meeting competition."

Busch actually said, at record 8,662, "There was no pricing authority in the southern division from a standpoint of any deviation from bulletins. Therefore, verification would have been stupid."

Furthermore, Mr. Fricano's misstatement was compounded by reference to the year 1967. The O'Brien memoranda, USG 168 to 71, and the Baldwin memoranda, the monthly reports, USG Exhibits 152 to 54, which are in evidence, clearly point out numerous instances of meeting competition in 1967 in the southern division.

[15,050] Mr. KECK. These are in addition to others that have been mentioned by Mr. Bartlit.

The COURT. They are noted in the record.

Did you want to put anything on the record in addition, Mr. Mellott?

Mr. MELLOTT. No, but I join in all—there is one area——

The COURT. Anything everybody else said you have got without joining, unless you disavow it.

Mr. MELLOTT. I do not disavow that. I think there is an additional misstatement in the record with reference to the statement that the record establishes that the laminated board on the one exhibit does not include vinyl.

The COURT. All right.

Mr. DeLone.

Let's go around the circle.

Mr. McSweeney, did you want to put something additional on the record?

Mr. MCSWEENEY. I have nothing in addition.

The COURT. You have already put yours on, Mr. Bartlit.

Mr. BARTLIT. Yes, sir.

[15,051] The COURT. Mr. Spradlin, do you have anything additional you want to put on the record?

Mr. SPRADLIN. No, sir.

The COURT. Mr. DeLone, you have some in addition?

Mr. DELONE. Yes, sir.

These relate solely to the matter Mr. Fricano stated in his reply or rebuttal, because I argued with anything else. I didn't object at all in his opening argument and I attempted to deal with those in my answer to that argument.

But in his reply he referred to Government Exhibit 250, with the statement that there was no way United States Gypsum could have gotten the information from the field that National was offering a new product, whereas the exhibit itself shows a report from the field to that effect.

He then adverted to the testimony of Mr. Webster and stated that Webster in his Grand Jury interrogation had acknowledged that Atwell knew Webster was verifying. The Grand Jury testimony does not bear that out. He stopped before the conclusion of what was read to the jury, so that he implied some inconsistency on Mr. Webster's part, where there was none and where the Grand Jury transcript did not show any.

He also argued that Mr. Webster was lying when [15,052] he said that he had gone right to work on the National Gypsum price announcement after November 17, 1965, asserting that National did not then have the information which would enable it to prepare its list.

Mr. Atwell's testimony made clear—Mr. Webster's testimony made clear that he had information, had National's old price list and information about the zones in which there would be no change and he began his work on the 17th, based on that information.

Mr. Fricano asserted that if there had been evidence of the prices in Dallas, the evidence would have shown they were all the same, they were stable. There was no evidence at all as to whether the prices in Dallas were the same or not and no basis for the assertion that the prices were the same.

Mr. Fricano asserted that the undated drafts of National's announcement of its price change effective December 15, 1965, which announcements were drawn for Mr. Nicely's signature, he said they were prepared before November 17th, 1965. They are undated and there is no evidence whatever that they were prepared before November 17, 1965.

Finally, he made reference to the fact that Government Exhibits 5081 and 5082, with reference to plant profit at National Gypsum plants, showed that in just four [15,053] of National's plants it made a large profit, giving the figures on Durasan and implied and urged the jury that National was supporting lower prices on half-inch wallboard with the profits it was deriving from al of its plants with reference to Durasan.

The exhibit had and testimony showed there were only four plants which make Durasan.

I want to say, sir, that I was unaware that I had any opportunity for surrebuttal. I told the jury in my opening statement I would not have such an opportunity and I believe most defendants' counsel expressed the same understanding and, indeed, when Mr. Fricano replied, he explained to the jury why it was he had the last speech. So that if I had such an opportunity, I was unaware of it.

The COURT. I will be happy to find it for you in the record where I told you, and if you decided that you had no opportunity, that was your decision. I thought that you were making a tactical play to the jury by giving them the old Hornbook thing I hope that you will think up for me what I could have said, if I had had the opportunity to say it. That is not a new statement. I have made that, too, in my days.

Mr. DELONE. I don't claim any novelty to the idea, but if I had known I had surrebuttal, I couldn't have said it.

[15,054] The COURT. If the people don't listen, I am sorry. I have told everybody that I made it as clear as I knew how. I

told Mr. Fricano if he exceeded the proper scope of rebuttal, he would open it up for surrebuttal and every one of you were present when I said it, I am sure. If you didn't hear it, or you weren't listening, that is just unfortunate.

Mr. DeLone. I have tried to listen as carefully as I can to everything that happened in court.

The Court. I am sure this is on the record either at a pretrial proceeding or some place where I discussed what the proceedings were going to be at trial. I may have said it to the jury in my preliminary remarks.

Mr. DeLone. I was quite aware of our opportunity for surrebuttal evidence.

The Court. On the closings.

Mr. DeLone. On closing, I was unaware of it.

The Court. I specifically said it and it is in the record.

Mr. DeLone. Whatever the record says, it says.

The Court. I am not going to debate it with you.

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[15,076] The Court. Now, gentlemen, have you reached an agreement on—Oh, first. Yes, sir.

Mr. Spradlin. Yes, Your Honor.

On behalf of Mr. Brown and Mr. Nicely I join the motion for a mistrial.

Mr. Mellott. If Your Honor please, on behalf of Georgia-Pacific, I would like to change the response I gave to Your Honor previously.

I now join in the motion for a mistrial.

Mr. Keck. Your Honor, I do the same thing on behalf of the United States Gypsum Company.

The Court. All right.

Gentlemen, I listened to Mr. Fricano's closing, and I listened to his rebuttal. I thought there was nothing improper about it. In fact, I thought he is to be commended for the considerable restraint which he exercised in the manner in which he addressed the jury.

I saw nothing wrong with what he said.

Naturally over a trial that lasted four and a half months there are misrecollections of the testimony. Certainly the jury knows, and I told them—I told them it wasn't his recollection of the testimony, it was theirs. And if their recollection differed from his, they weren't to accept his.

I see no reason to grant a mistrial on that [15,077] basis. And I am delighted at the opportunity to state for the record that I thought that it was a commendable showing of restraint under all the circumstances.

Mr. Fricano. Thank you, Your Honor.

The Court. The motion is denied.

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[15,083] The Court. All right. Now I am going to call the jury back in, because I don't want anybody to talk to the jury except on the record in open court. So I am going to call them back in and tell them that of the documents they requested these exhibits will not be furnished them, and I don't know that I am going to tell them why. I think I am going to just tell them that I don't deem it appropriate for them to have them rather than say what they are and why I am ruling that way.

Does anybody want me to tell them specifically why they can't see them?

Mr. DeLone. Not exhibit by exhibit. But I wonder if Your Honor might tell them that several of the number that they had asked for had not been admitted into evidence in the first place, which it seems to me . . .

The Court. Four of them weren't admitted, and one was withdrawn.

[15,084] Mr. DeLone. So they don't feel that we are holding something out on them, that's all.

The Court. Let's go off the record.

[Discussion held off the record.]

[15,085] Mr. Hiering. Your Honor, for clarification, Mr. Grainer referred to Georgia-Pacific Exhibit 2858. And it is our understanding there is no such exhibit.

Mr. Mellott. I have already discussed that with Mr. Grainer. There is no such exhibit.

The Court. Did they ask for it?

Mr. Mellott. Yes, Your Honor.

The Court. Well, I better tell them. 2858.

Mr. Mellott. Georgia-Pacific 2858, we didn't get quite that high.

The COURT. All right.

Mr. MELLOTT. It just seemed that long.

The COURT. Are there any others now that we are not giving them for some reason?

Mr. HIERING. Yes.

18 and 19 you ruled that they are not going, and Georgia-Pacific 18 doesn't exist either.

The COURT. All right.

Is that it, Rich?

Mr. THORSON. Are you sure it was "G–P" and not "GX?"

Mr. GRAINER. They said GX.

The COURT. 1858 and Georgia-Pacific 18, there are none.

[15,086] Mr. GRAINER. Right.

The COURT. 18 and 19 I have decided that they shouldn't see.

And the other one was withdrawn, and the others weren't admitted.

1684 was not admitted; is that right, Mr. Grainer?

Mr. GRAINER. Right.

Mr. FRICANO. If Your Honor please, would it be permissible for——

[Jury returns to courtroom at 3:58 p.m.]

The COURT. Ladies and gentlemen of the jury, I called you back to explain to you the facts concerning certain exhibits which you had requested.

You had requested Government Exhibit 12. That exhibit was withdrawn during trial.

You requested Government Exhibit 5016, 5018, 5020, and 1684. Those exhibits were never admitted in evidence. For that reason we can't make them available to you.

You requested Georgia-Pacific Exhibits 2858 and Georgia-Pacific Exhibit 18. There are no such exhibits.

Juror No. 8: That was found out. We made them "GX" instead.

The COURT. Oh, those are "GX" instead of "G–P?"

[15,087] Juror No. 8: Yes.

The COURT. 2858 and 18?

Juror No. 8: Yes.

The COURT. All right.

Then I will have to reconsider those.

Government Exhibits 18 and 19, which you have requested, I have decided that the contents of those are such that it is not

appropriate for you to examine, to see, so you won't get them.

Juror No. 8: Now, all these numbers that were given during rebuttal and the closings, we had no notes, so we can't remember those numbers. And we would like to have a list of the numbers or documents put in the order that they want to put them to give them to us from both sides.

The COURT. Those are only documents that you already have.

Juror No. 8: But we don't know which ones they are. There is a lot of documents to hunt through in there.

The COURT. I will discuss that with counsel in your absence. I don't know what to do about that.

Juror No. 11: They all said they wanted us to see these documents, but we didn't write them down, [15,088] we had no pencils or paper.

The COURT. That's right. And ordinarily, you know, jurors don't have any pencils and papers during the whole trial, but I made an exception to that in this case for you because I thought in a trial this long it wouldn't do much good if you didn't have some kind of notes to refresh your recollection.

I will review 2858 and 18 in light of the fact that you tell me now that they are Government exhibits and not Georgia-Pacific exhibits. And either I will send them out to you, or if you don't get them, you know I decided not to for some reason.

All right, will the bailiff retire the jury, please.

[Jury retired from courtroom at 4:00 p.m.]

[15,089] The COURT. Gentlemen, we have another——

Mr. MELLOTT. Well, Your Honor, you did rule on Government Exhibit 18. You already ruled on it.

The COURT. GX Exhibit 18, I already ruled on. I think I ruled on 19, too, didn't I? What about 2858?

Mr. FRICANO. I think that is the price list. We have it downstairs. Maybe Mr. Grainer can get it.

Mr. GRAINER. I have a whole list.

The COURT. He has another list.

Mr. DELONE. More?

Mr. FRICANO. A list?

The COURT. Yes. Mr. Hiering is obviously the exhibit expert for the Defendant. Excuse me, I don't want to call anybody experts. He is the designated attorney on exhibits.

So would you, Mr. Hiering, work with Mr. Grainer on those exhibits that they have now requested?

Mr. HIERING. Yes, Your Honor.

The COURT. And, hopefully, you will agree as to them. If not, now, does everybody want to be present while we discuss it? It can easily be done. I am going to be here, anyway.

[15,090] Mr. FRICANO. I have a request in this connection, Your Honor.

The COURT. If defense counsel is willing to designate Mr. Hiering and Mr. Fricano will designate somebody and everybody will agree as to what they say, we can operate that way. If not—and this is a matter for defense counsel. I don't care, one way or the other. If there is no agreement—I have to be here, in fact. I have to be here. So, if you all want to be here, fine. It is always pleasant to talk to you.

Mr. DELONE. If we could find out what the new list is, I might know something about a National Gypsum exhibit Mr. Hiering wouldn't know.

The COURT. Then, Mr. Grainer, will you work with all the counsel and see if we can reach an agreement on thise exhibits?

Mr. DELONE. Review it first and then ask Your Honor to come back?

Mr. FRICANO. I have a suggestion, if I may.

The COURT. All right.

Mr. FRICANO. May we, in light of the jury's request, revert to my earlier request, Your Honor, and take the 150 documents we have designated and, please, let's put them in a box.

[15,091] The COURT. Mr. Fricano, no one knows what shape those exhibits are in now. They have been working on those for a day and a half, and nobody is going to look at those during the course of deliberations. They may have made notes. They may have done any other kind of thing. I am not going to permit anybody to sort out the exhibits they are working on.

Mr. FRICANO. May we, in the alternative, present to the jury a list of the document we designated?

The COURT. I don't see any point to that.

Mr. SPRADLIN. I would object to that, Your Honor.

The COURT. What?

Mr. SPRADLIN. I would object to that.

The COURT. I already said we are not going to do it. You are objecting to my saying we are not going to do it?

Mr. SPRADLIN. No, Your Honor. I can't see you, sometimes, when Mr. Fricano is up.

The COURT. What about this proposal that they want a list of the various documents all of you referred to in your closing? It seems to me that that is practically an impossibility.

Mr. FRICANO. We can do it, Your Honor.

[15,092] Mr. HIERING. I think we would object to that, Your Honor, and it would be meaningless to them, anyway. It would be just a list of numbers.

Mr. FRICANO. Every time we come up with something we can do, the Defendants say it is meaningless.

The COURT. Whether it is meaningless or not, my problem is that is what the jury asked for. I don't know what good it will do to give them a list of all the documents that were referred to in rebuttal. They will just have a long list of numbers, and it can be done easily by going through the transcript of the closing.

Mr. FRICANO. I would respectfully request the right to do it, Your Honor.

The COURT. Make up a list—just a list captioned, "Exhibits Referred to by Government in Closing"?

Mr. FRICANO. Yes, Your Honor.

The COURT. If any other Defendants wish to do the same thing, you make up your list. If you don't want to do it, don't do it.

Mr. BARTLIT. Your Honor, I would object to the procedure for two reasons. Number one, it was the Government that chose to protract this trial by putting in thousands of exhibits. Now, they want to cull [15,093] out a few exhibits and put those in evidence.

The COURT. I am not not talking about that. I am talking about those.

Mr. BARTLIT. Yes, sir, I know that, but I am saying this is tantamount, in the middle of jury deliberations, presenting a written summary on final argument—it is undue emphasis on particular documents. It is improper. I know of no situation where a jury has ever been given, in writing, during deliberations, a summary of documents on either side.

The COURT. There have been cases where they were given a complete transcript of the trial.

Mr. BARTLIT. I think it is improper to give a transcript of summations. It is proper to give a transcript of the evidence, but what a lawyer says is not evidence. They have the evidence. It is improper to provide a key during the deliberations.

The COURT. Bring in the jury.

I will say, "Over objections, I am not going to furnish you a list." I am not going to say who objected.

Mr. FRICANO. Mr. Bartlit—this is the same man who says he wants to put in charts for points of emphasis. He runs this way and then he runs this way and then he runs that way.

The COURT. I think he was wrong then, [15,094] and he is right now.

Mr. BARTLIT. And that is the way Your Honor ruled.

The COURT. Bring in the jury, and I will tell them that.

Mr. MELLOTT. Your Honor, I would prefer that Your Honor simply say it can't be done, and exclude from your comment, "over objection."

The COURT. Why? Then they are going to say I am the one that didn't give it to them.

Mr. MELLOTT. That can't be prejudicial, Your Honor.

The COURT. They are not going to vote on me.

Mr. MELLOTT. They are not going to vote on you.

Mr. BARTLIT. I think that's right, Your Honor.

The COURT. Off the record.

(Discussion was held off the record.)

(The jury returned to the courtroom.)

The COURT. All right. We won't worry about the fact that jurors, who were hard at work, do not have their neckties on.

Ladies and gentlemen, you asked for a list of all [15,095] exhibits that were referred to in the closing arguments of trial.

As I told you, you know, those closing arguments are not evidence. Those are summations. They are attempts to help you in marshalling the evidence, and that is why I didn't let you take any notes as to those things.

You must recall, to the extent you can, that which you think they said which is helpful to you.

It is not practicable, at this time, to make up such a list, and, if we did make up such a list, it wouldn't do you any good. You already have the exhibits, and all you would have would be a long list of exhibit numbers, without any list of what was said, and we cannot give you a summary of what was said during summations. That is improper. So, for that reason, we are unable to comply with that request.

You have requested additional exhibits, and we are looking into those to see whether there is any reason you shouldn't have them, and, instead of calling you in again, we will give you

those which I think you should have; and any which I don't give you, you will know you didn't get them because there is some reason you shouldn't have them, in my opinion.

All right. Thank you. You may retire and continue your deliberations.

[15,096] (The jury retired from the courtroom.)

The COURT. All right. That closes the record.

Is there anything else anybody wants to do before we recess subject to further call?

(No response.)

* * * * *

[15,114] (Court reconvened at 9:34 a.m. o'clock. Jury was present.)

The COURT. Good morning, ladies and gentlemen.

You ladies and gentlemen have asked for certain additional exhibits. Now what we are going to do is, you will recall during the trial there were certain exhibits which I said part could be read to the jury and there are other parts that didn't appear to me to be appropriate, and therefore they were not going out to the jury. With the exception of those, I am now going to have Mr. Grainer move all the exhibits into the jury room, with the exception of the Celotex and United States Gypsum exhibits in these boxes. Everything else will be in the jury room and you will have all the exhibits which there are. So there won't be any reason thereafter to ask for any other exhibits. You will have them all.

If you want to come in the courtroom and look through these boxes, you let Mr. Keene know and we will arrange for that.

As to every other exhibit, it will be in your possession. That is every other exhibit that I feel you should look at. The ones I think you should not look at, but were read to you, you have to rely on your recollection, [15,115] as you do with the testimony of the witnesses.

You also have asked that I define for you again the Robinson-Patman Law and the meeting of competition in good faith.

So far as it concerns us in this case, the Robinson-Patman Act provides that it is unlawful for a seller of a commodity to discriminate in price between different purchasers of that commodity, where the effect of such discrimination may

substantially lessen competition or injure, destroy or prevent competition.

Now what this means is that where a seller has two customers which compete in the same market—for example, it would be appropriate here, two lumber yards in the same vicinity—the seller, that is the manufacturer and seller of this board, may not sell to one of them at a lower price than it sells to the other, for the effect of such price discrimination would tend to injure the unfavored customer in his effort to compete with the favored customer.

That is the essence. In essence, the provisions of the Robinson-Patman Act that in the same market they have to sell to various purchasers at the same price and the same terms and conditions.

The Act does provide certain defenses which are available to a seller who chooses to discriminate in price between two customers. And insofar as we are concerned, [15,116] the defense we are concerned with is where the discrimination was done in good faith to meet competition. If a seller believes that it is necessary to discriminate between—sell cheaper or sell on better terms and conditions to one customer than another merely because he is doing that in good faith to meet competition, then he may do so. But, of course, he would then have the responsibility of showing that the lower price or the difference in services or facilities which he gave to one purchaser over another was done in good faith to meet an equally low price of a competitor or to meet the service furnished by a competitor.

What this means is the lower price is not a violation of the Robinson-Patman Act, if the seller can show he charged it because he believed in good faith one of his competitors charged a lower price or gave better terms or conditions.

The Act doesn't establish a particular method the seller has to use to establish giving the lower price. It merely requires that the facts he has available to him are such as would lead a reasonable man, a prudent person, to believe there was such a lower price or better competitive situation offered. He has to do that in good faith and make such inquiry or such investigation as to satisfy the requirement what would a reasonable, prudent person do under the circumstances.

[15,117] Now I have repeated that to you. I hope that is a satisfactory description.

Is there any objection by any counsel as to the definition which I have given?

Mr. MELLOTT. No, Your Honor.

Mr. BARTLIT. No, sir.

The COURT. I hope, Mr. Foreman, and members of the jury, that meets your needs in the matter.

Do you feel that you want me to further try to describe it any further to you?

The FOREMAN. What do you want?

JUROR No. 2. It is enough.

The FOREMAN. It is enough for me.

The COURT. Fine.

You go back to the jury room and you will get the rest of these exhibits and there won't be any occasion for you to ask me for any additional exhibits, because there are no more, except you are entitled to see those boxes, when you want to.

[The jury was retired at 9:44 a.m. o'clock.]

The COURT. Gentlemen, I trust that you realize I gave that not from the charge itself. You know, I didn't read the charge. I took my notes, but that is, in substance, what I told them originally and I believe that is an appropriate statement of the Robinson-Patman [15,118] Act as it is here appropriate.

Mr. DELONE. I followed it in the transcript and it was remarkably close, not the identical words, but certainly the spirit.

The COURT. I think it was close. I took my notes and I have rather complete notes.

Is there anything else now?

All right.

Then if Mr. Hiering and Mr. Mullin, if you will get together and work on those exhibits and pull out only those which I said would be read to the jury and would not go out, and the rest of them, we are going to send out, so that they will have everything out there. They will have everything they are going to get.

Mr. DELONE. I have asked Mr. Floyd, who has worked on these exhibits with Mr. Hiering, to stay, too, if that is all right.

The COURT. It is all right with me. I don't care who stays. As a minimum I want Mr. Hiering and Mr. Mullin. If anybody else wants to stay, you are more than welcome. I don't know when—I think that will eliminate the necessity of so many conferences and bringing back the jurors. But, of course, if they ask additional questions or they have a verdict, we will call you.

If they want to see these boxes, you know what [15,119] they are and I will not ask you to all come in and meet on that, although we will let you know if they ask to do it.

If they ask to see them, we will not divide among them. We will let them see all of them. There will be nobody in the courtroom and we will ask the jury not to go beyond the railing out there.

Mr. FRICANO. If Your Honor please, yesterday the jury asked for certain exhibits and I thought, I hope they were provided to them. I am sure they were. But, for some strange reason, they have asked for one or two or three of those same exhibits this morning.

The COURT. That is because they can't find them. They have so many exhibits and they don't find them and there is no way I know to help them out of that proposition. They will have every exhibit there is after you fellows have withdrawn those which they should not see. There will be no question that they don't have any.

Mr. FRICANO. I understand that, but one of the—certain of the exhibits which they have asked for are exhibits which show competitive contact in 1970.

The COURT. They have got them.

Mr. FRICANO. They have got them?

The COURT. I can't go into the jury room and pick them out for them and neither can anyone else.

[15,120] Mr. FRICANO. We can generate additional copies.

The COURT. No. They have got them. There are no exhibits that are not there, so far as I know.

Mr. FRICANO. They asked for 1010, 1387 and I believe 1011 yesterday and they are asking for this same three today.

The COURT. Would you check and see if those same three are there, Mr. Grainer?

Mr. GRAINER. Okay.

The COURT. If not, we will ask for additional copies. If they are not there, we can get additional copies. I am sure they are.

There is no place else for them to be.

Mr. BARTLIT. I might suggest you check while the jury is at lunch. I don't like to have anybody there while they are in there.

The COURT. Will you do it while the jury is out for lunch? We will give you compensatory time to have lunch and you check them then to see whether or not they are there.

Mr. FRICANO. I would respectfully ask the Court that that be done now.

The COURT. I think it is a good idea to wait until they go to lunch. I don't want anybody [15,121] in the jury room at all without the court reporter being present and writing down anything that is said and nothing should be said here and I am not going to allow any counsel to go into the jury room and I think——

Is there anybody here that objects to Mr. Grainer going in that jury room by himself and doing this while the jury is out at lunch?

Mr. MELLOTT. I have no objection to his going in and looking for those exhibits. I would object to his rearranging them in any fashion while he is in there.

The COURT. He is going to look in there.

Mr. GRAINER. After going in yesterday, I think it is totally impossible to rearrange anything.

The COURT. He will look through and see if he finds them and if he finds them, fine. If not, we will ask for others. I am quite certain that they are there.

Mr. MELLOTT. I would assume he took in yesterday the documents that were asked for yesterday, so they must be there, Your Honor.

The COURT. Did you give them to them? What about those three? Were they asked for yesterday? Did we have them yesterday, Mr. Grainer?

Mr. GRAINER. I don't recall what [15,122] happened yesterday, but whatever happened I took them in, whatever exhibits they asked for.

Mr. FRICANO. We couldn't find them.

The COURT. I can't help it if they can't find them, Mr. Fricano. There is 5,000 exhibits and I have no intention of going looking for them or allowing anybody else to do so. That is just one of those things. They were taken in there just yesterday, so we know they are there.

Check at lunch while they're out and we will see just to reassure ourselves, and tell me whether you find them or not and we will see what will happen after that.

Mr. BARTLIT. I didn't understand they were taken in yesterday. I see no reason to check at all, really.

The COURT. I don't remember, but I will do it as an abundance of caution. I will do nothing about it. I just want to get a report.

Mr. BARTLIT. The thing I don't want to happen is Mr. Grainer to go in and say here they are. That way they will be emphasized.

The COURT. We will put them in with all the rest of the exhibits we will give them this morning after you gentlemen have gone through them.

All right.

[15,123] We will recess the Court until further call.

(At 9:52 a.m. o'clock the Court was recessed.)

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[15,128] (Friday July 11, 4:15 p.m. o'clock. All counsel and defendants are present.)

The COURT. I have reason to believe that some of the jurors aren't feeling well. Some are tired. We have several alternatives under this proposition. We can ignore the whole situation and tell them to go ahead and deliberate, or just do nothing. We can send them to the hotel now for a little rest and ask them to come back and commence their deliberations again at some occasion when they have had a little chance to rest or send them home for the weekend.

Does anybody have anything? There are other alternatives, but those are the ones I am considering.

Mr. BARTLIT. Your Honor, it bothers me to send them home for the weekend. It just bothers me for obvious reasons.

The COURT. Of course, the circuit says I can do it.

Mr. BARTLIT. Yes, sir. You asked my opinion.

I am not that familiar with the area, but I know there have been stories in surrounding area newspapers and on the radio. There were things said about the no contest pleas by certain defendants and while I am [15,129] realistic, and it is unlikely, there is a cognizable risk in my mind. Maybe the defendants might want the cautious——

The COURT. Bear in mind I am pretty conscious of the case and I have not heard anything.

Mr. MELLOTT. It has been on the radio.

Mr. BARTLIT. Why I commented the way I did, it seems to me we cannot be heartless. As I sit here, my offhand reaction is to put it up to the jury, if they would like to go back to the hotel and rest and come in the morning, if that is what they want to do, put it up to them.

The COURT. You mean go to their homes?

Mr. BARTLIT. No, back to the hotel and rest, if they are just tired of deliberating.

The COURT. We can call the entire jury into open court and ask the question or call the foreman before us here.

Is there any suggestion?

Mr. MCSWEENEY. Is Your Honor able to tell us anything more as to is somebody actually sick?

The COURT. I understand so.

[15,130] Mr. FRICANO. Somebody is actually ill?

The COURT. I understand so.

Mr. MELLOTT. More than one, or just one?

The COURT. I know at least one juror isn't feeling well. We were asked this morning—I was asked for something for headaches and upset stomach and we provided it from the doctor, Dr. Sims, in the building. We provided medication.

I am further advised that one of the jurors is suffering from some chills.

Now it is kind of brutal just to say, "Go right ahead."

Mr. MELLOTT. Well, as far as I am concerned, I would be willing to have them go back to the hotel, but I, too, would oppose their going home for the weekend. I am concerned about the outside influence during the period of deliberation, Your Honor.

The COURT. What is the consensus, if there is a consensus, if I tell them to go home and take Saturday off and relax?

Mr. MELLOTT. You mean to the hotel?

The COURT. Oh, yes. I am not thinking of sending them home, really.

Mr. FRICANO. How about with respect [15,131] to the person or persons who are ill, just send them home, if they are actually ill, so they can be checked out by a doctor? To send them back to a bare hotel room, if they are ill, might be a little bit——

The COURT. I don't have much information to do that, because without your knowledge I have not been willing to talk

to the jury. I just know we were asked for headache and stomach medicine and then we were asked for a blanket.

Mr. DeLone. Your Honor asked if we would suggest an open court session or bringing the foreman in here. Could we not start with bringing the foreman in here?

The Court. We could.

Mr. DeLone. And if it seemed necessary to go further—sometimes it is embarrassing to an individual, assuming it is not the foreman that is ill——

The Court. I'm sure it is not.

Mr. DeLone. ——for that person to be put on the spot.

The Court. I am told the people who are not well are jurors and there is one juror, I understand, who has run out of high blood pressure medicine and we have gotten some more for him. But I [15,132] think it is one or more women that are not well.

Mr. Mellott. It seems to me as far as I am concerned, as I indicated, I would be willing to have them go to the hotel and willing to have a doctor, obviously, treat anyone that is sick, there, but I am not in favor of any juror going home.

The Court. I'm not even considering that. That is not our problem.

Mr. Mellott. I was responding to what John said.

The Court. My question is: Do you want to call the foreman in here and have me talk to him or call the entire jury into open court and talk to them?

Mr. Warnke. I would think, as Mr. DeLone says, Your Honor, we could start with the foreman and see if we get sufficient information that way. I think we probably could.

Mr. Fricano. I'm not—yes, sir.

The Court. Do you agree with that?

Mr. Fricano. Yes.

The Court. Mr. Nicely, do you agree with that?

Mr. Nicely. Yes.

The Court. Mr. Brown?

[15,133] Mr. Brown. Yes.

The Court. Mr. Watt?

Mr. Watt. Yes, sir.

The Court. All right.

Ask the foreman of the jury to come and see us here.

When he is here, gentlemen, if you will please let me say anything to him that is said. I would prefer that no one else even say good afternoon.

Mr. Fricano. Perhaps Your Honor had in mind cautioning him not to mention anything that is going on.

The Court. I will tell him right off the reel not to mention the deliberations or how they stand or anything along that line.

After a four and a half month trial, now they have been in deliberations since Tuesday, this is a considerable strain.

Mr. McSweeney. Sure.

Mr. Bartlit. They are not kids on that jury.

The Court. We are not kids. There are some older people, people my age and older.

Mr. Bartlit. They are considerably older, Your Honor.

[15,134] Mr. Warnke. Even my age and older.

(The jury foreman entered.)

The Court. Mr. Russell, you are the foreman of the jury?

Mr. Russell. Yes, I am.

The Court. Will you please have a seat.

I have asked that none of the counsel or the defendants present in this room say anything whatsoever, and I also ask you not to discuss the nature of the deliberations, what stand anybody takes on anything, or how the jury stands on any of the merits of the case.

It has been reported to me that some of the jurors are quite tired.

Mr. Russell. They are very tired and some of the ladies are tired out and we have had two or three crying and they have been out a long time, away from home for a long time.

The Court. Is anybody sick?

Mr. Russell. They are going to get on the verge of it, I think. One is concerned about ulcers in the mouth. She thinks they are coming back. The other one, I think she realizes what a responsibility it is and she cannot find a way to find the answer.

[15,135] The Court. Now would you think it would be helpful—we are not—we can't let people go home. Would you think it would be helpful if we recessed your deliberations until Sunday afternoon and allowed you to relax in the hotel?

Mr. Russell. I think you want to get—on the other side you will get some of the men who are losing money by this and they

want to get the decision, but whether it can be reached or not with the women in that condition is hard to say.

The COURT. I am——

Mr. RUSSELL. It is like if you are no good at negotiations and they are not ready to give and take yet.

The COURT. I am willing to allow the jury to continue to deliberate or I am willing to say if anybody isn't well, go to the hotel and relax, and if anyone needs medical attention, see that they get it. Since I don't want to talk to the individual jurors, I have to rely on you, the foreman.

Mr. RUSSELL. What I would like to do, to suggest, is I put it to a vote and see what the general opinion is.

The COURT. Tell them what the alternatives are, to continue to deliberate or to take [15,136] a recess from the deliberations and relax until tomorrow or Sunday, as they see fit.

Mr. RUSSELL. It is pretty long hours, you know, from eight o'clock to ten o'clock at night and you are in close quarters and I think it is going as well as can be expected.

The COURT. Would you find out what they would like to do and come back and tell us, with the exception I can't send them home?

Mr. RUSSELL. We realize that.

The COURT. Would you tell them, short of that, I am willing to do what we can do to give them a chance to relax and be more comfortable, such as a recess in their deliberations. If they want to take a recess for some period of time, tell me what they want to do and we will see if we can do it.

Thank you, sir.

We will wait here and will you tell the tipstaff when you are ready to answer.

(At 4:25 p.m. the foreman returned to the jury room.)

(4:43 p.m.)

The COURT. Mr. Russell, what is the desire——

Mr. RUSSELL. They have come to a [15,137] sort of a compromise.

They would like to limit deliberations until 6:30, when we go to lunch, and go directly up there. We would like to work tomorrow that same way, except for what the church schedule is, to go to church.

The COURT. I want to do this on Sunday; I am willing to have you work until 6:30 tonight and go to dinner and go relax. Tomorrow, the same thing.

As to church, I want you to take Sunday morning off, start your deliberations at one o'clock and anyone that wants to go to church, I will provide marshal service for people to go.

Mr. RUSSELL. Most of them wanted to go Saturday night, go to the Epiphany.

The COURT. I would prefer them—I don't like to ask people to work on Sunday. We will compromise and start at one o'clock.

Mr. RUSSELL. The thing that is bothering the two women are the long, long hours.

The COURT. You see, Mr. Russell, this is the problem. Not everybody can go to church on Saturday night and I don't want to get into that kind of problem. I would prefer to say we will start deliberations on Sunday at one o'clock, so that marshals will be available to take anybody to whatever church [15,138] they want to go to on Sunday morning. But there are some religious services on Saturday night, but I don't think we can——

Mr. KEENE. They wanted to go to the one church Saturday night and start deliberations and work it like a Monday on Sunday.

The COURT. They are all going to the Catholic church?

Mr. RUSSELL. That is what they indicated.

The COURT. I will agree that we will stop deliberations at 6:30. Everybody can sense that deliberations will stop at 6:30 and I will agree to the Saturday night, if they won't accept what I propose, and that is that they go on Sunday morning.

Mr. RUSSELL. I will put it to them that way.

The COURT. There are other problems, I will ask, without indicating, that no counsel go to the Epiphany on Sunday morning. That is why I would ask you to do it Sunday morning. We have to have marshals. If they will do it that way, would you let Mr. Keene know? If you are satisfied to do it Sunday, they can start at one o'clock or whatever time they want on Sunday.

All right?

[15,139] Mr. RUSSELL. All right.

The COURT. You think you will be able to continue without any physical problems?

Mr. RUSSELL. It is a matter of nerves and that is what it is.

The COURT. Do you think it would be helpful if we asked everybody to come into court and I tell them, or would it be all right if you do?

Mr. RUSSELL. Let me talk to them. They are pretty sick of going into court.

The COURT. For the rest of their deliberations, you tell them we are going to stop at 6:30.

Is that what you want?

Mr. RUSSELL. I think that is one of the things they are after right now.

The COURT. We will stop at 6:30 and if they want, they can go to church Saturday night. If they want to do it on Sunday, I am willing to do that, too, as long as I know what they are going to do.

Did they know about the alternative Sunday morning?

Mr. RUSSELL. I told them that not from what you told me. I understood when you served on jury duty anybody can go to a church of their choice, [15,140] and Saturday was something I didn't know about.

The COURT. If they want to do it on Sunday, they can do it and we will not have to meet again. You can tell Mr. Keene about it and at 6:30 they can go to dinner and go up to the hotel.

Mr. RUSSELL. Thank you. I appreciate it very much.

(At 4:50 p.m. the foreman returned to the jury room.)

The COURT. I didn't follow your suggestion.

Is everybody satisfied that we have done what we can do?

Mr. FRICANO. I think we are safe for the rest of the night, aren't we?

The COURT. You are at 6:30.

(At 4:52 p.m. the court was in recess.)

[15,141] (Saturday, July 12, 1975 at 2:45 p.m.)

The COURT. Good afternoon.

Ladies and gentlemen of the jury, you have sent me probably about three or four questions here all written out in one.

You stated, "that on your final charge to us and even during the trial, did you tell us to listen to the answers and make up inferences from them more than from the questions asked?"

Now what I charged you was that the questions are not evidence. The answers are evidence. So the fact that somebody

asked a question doesn't mean that there is any factual basis to the question. He is probing to ask for the question and it is the answer that counts.

But if someone is asked a question you think he should be able to answer, and should answer, and doesn't, you may want to draw some inference from that kind of situation.

Next you say, "Some of the documents to clarify certain matters, we can't seem to find in the case. Must we have a document for proof?"

Absolutely not. Documents are only part of the evidence. This is not a case built solely on documents. We listened to days and days of testimony and I told [15,142] you—and I am going to tell you again—that the evidence in the case is everything that you heard here. It is the testimony of the witnesses. It is the summary that you saw of testimony. It is the opinion evidence you heard. It is the stipulations you heard and also the documentary evidence. No one kind of evidence is the sole governing factor in this case.

Now I don't know why you don't understand that. I have told you that at the beginning of the case. I told you that at the end of the case and I am telling you that now. You must rely on your recollection.

There are thousands and thousands of documents in the jury room. I know that. And whether you are able to find a particular one or not—I don't know what particular one you are looking for—if you can't find it, you will have to rely on your recollection of just what is in it or look for it, but it is not any one thing, no one catch thing, no one key to a case. Documents are part of the evidence.

Now then, you also asked me: "Should we rely on the witnesses' answers and take from one whether or not we thought he was truthful, taking into consideration his position in his company?"

I am not sure what you mean by that. If a man is employed by one of the defendants in the case, of course [15,143] he is an interested witness, perhaps, and then you must examine his testimony a little more carefully. Not just because he is an interested witness, he would not tell the truth. The defendants are interested witnesses. People who work for defendant companies are interested witnesses. You merely must examine their testimony a bit more carefully. But you determine whether

a witness is telling the truth, and again I will repeat this to you, from his demeanor on the stand, from whether or not he appears to be talking to you with candor or lack of candor, whether he appears to be talking to you truthfully or not truthfully, does he appear to you to be answering frankly. These are all factors that you consider. And the fact that somebody might be employed by one of the companies, you may want to consider that, because you may—but, I again caution you, that doesn't necessarily mean you don't believe him because he is working for one of the companies. It merely means you examine his testimony a little more carefully than you would otherwise.

Now the last question, as I see it, you asked me: "Should the jury decide the case on the documents and testimony?"

And you have documents and then you added testimony as an after thought. I again reiterate to you that the [15,144] documents are part of the evidence, but there is other evidence in this case which must be considered by you. Then you want to know, "presented as between December 27, 1968 and December, 1973."

Absolutely not. Now I told you—and I am going to repeat it again—it is the charge here that a conspiracy started in 1960 and we heard considerable testimony of what happened before December, 1968. I am sure you don't think we did that just for the exercise of listening to testimony. You listened to the testimony of what happened before December 27, 1968, because it is charged the conspiracy started before that. If you find that it started before that, then you have to find whether each of the defendants joined into such a conspiracy. And you remember I charged you on what you have to find, to find there was a conspiracy, and how the evidence on joinder must be independent. But by all means you don't ignore the testimony prior to that date. You listened to it and you pass on it.

Then you must determine whether or not something happened after December 27, 1968, in furtherance of the conspiracy, because something had to have been done in furtherance of the conspiracy during the statutory period, which is after December 27, 1968. But what happened before is to be used by you first to help you [15,145] decide design, scheme, motive, plan, and also to decide whether there was a conspiracy that started before that time and continued within the statutory period.

But you don't, you don't just look at part of the evidence you heard either by class of evidence or by date of evidence. You must listen to the whole thing.

Now you must decide whether there was a conspiracy, whether it was proved in accordance with the way I charged you, whether it continued within the statutory period, whether something happened in furtherance of that conspiracy by one or more of the conspirators during the statutory period, and if so, it would be binding on all of them unless somebody—all of them whom you are satisfied beyond a reasonable doubt joined it—and anything I say about proof must be beyond a reasonable doubt—unless somebody abandoned or withdrew from it. And you have to determine that. You have to determine that by whether they positively made a positive statement of withdrawal to the co-conspirators or informed a law enforcement official of their withdrawal.

Now it is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, so long as you can do that without violation to your individual judgment.

Each of you, of course, must decide the case for [15,146] yourself only after an impartial consideration of all the evidence in the case with your fellow jurors.

In the course of your deliberation, do not hesitate to reexamine your own views or change your opinion, if you are convinced it is erroneous. Do not surrender an honest conviction solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. But consult conscientiously and freely with each other and re-examine your own views, if that becomes necessary, within the limits I have stated.

Mr. Foreman, is there any other matter you wish to——

Mr. RUSSELL. Not that I know of.

The COURT. I am going to allow the jury to return to the jury room and if you need further clarification on this issue, I want you—remember now, you are duty bound to follow my charge here. I expect you to do that. I expect you to follow the law as I gave it to you. That is your sworn duty.

All right, retire the jury.

Mr. Foreman, if there is something else, we are going to wait a while to see if there is any further clarification needed. Would

you tell Mr. Keene only whether there is or is not any further clarification [15,147] as to these matters which the jury would like to have?

[The jury was retired at 2:55 p.m.]

The COURT. I suggest that we will wait a while now and see if there is something else.

Mr. BARTLIT. Your Honor, I have an objection.

The COURT. Put it on the record.

Mr. BARTLIT. When Your Honor said twice that when an individual is employed by a company involved in litigation the jury must examine his testimony more carefully, I understood that the normal instruction was the jury can consider all of these factors, including——

The COURT. I said that, Mr. Bartlit.

Mr. BARTLIT. I thought that was undue emphasis on the fact the individual was with the corporation.

The COURT. So be it. It is on the record, Mr. Bartlit.

Mr. BARTLIT. Secondly, the Court in talking about the statute of limitations two or three times referred to the conspiracy instead of a claimed conspiracy, and it seemed to me, sitting here, as if there was a conspiracy and the only question was who [15,148] joined it and I object to the use of the word conspiracy.

The COURT. All right.

I can't conceive of anybody reaching that conclusion, but you put it on the record.

I said anything—I say anything must be proved beyond a reasonable doubt.

Mr. FRICANO. I think the Court bent over backwards on that.

The COURT. To go any further along the lines you are suggesting, Mr. Bartlit, would have required the total repetition of almost the whole thing, which I think takes three hours.

Mr. FRICANO. Well over two, Your Honor.

The COURT. However, if any counsel feels their rights are being adversely affected by my not giving the whole charge, we can do that.

Mr. BARTLIT. I don't feel that way, Your Honor.

Mr. MELLOTT. If Your Honor pleases, I assume there is no need for us to object to the portion of the statute of limitation charge in the same manner I gave before.

The COURT. It is the same charge I gave.

[15,149] Mr. MELLOTT. I understand and I gave those and I assume there is no need to renew those at this point.

Mr. KEENE. There is no more, Your Honor.

The COURT. The jury will remain in deliberation until 6:30, at which time they will retire until 12:00 or 1:00 Sunday morning and will deliberate then until 6:30.

Mr. MCSWEENEY. Does that mean there is not going to be a luncheon recess of the jurors today?

The COURT. Today they didn't get here until late.

Mr. MCSWEENEY. That is true.

The COURT. For that reason, they had brunch, so there won't be a luncheon recess. They will go from now until 6:30. It is a Pittsburgh custom if we have late breakfast we call it brunch and we don't eat lunch, too.

Mr. DELONE. Your Honor said 12:00 or 1:00. For my own information, I would like to know which it might be.

The COURT. Mr. Keene, what time are they going to start tomorrow?

[15,150] Mr. DELONE. I want them to start whenever they want to, just so I could know.

The COURT. The only problem is they are going to church.

Mr. DELONE. I don't want to interfere with that.

Mr. FRICANO. I don't think anybody can tell what time they will be back.

The COURT. Yes, they can. Mr. Keene?

Mr. KEENE. I will say 12:30.

Mr. DELONE. Thank you, sir. That gives me all the information I need.

We will recess until further call.

[At 3:30 p.m. the court was recessed.]

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[15,154] [Sunday, July 13, 1975, 4:07 p.m.]

[Jury present.]

The COURT. Ladies and gentlemen, you have advised me you don't think you can reach a unanimous verdict.

Have you reached a verdict or are you able to on any of the defendants?

The FOREMAN. None.

The COURT. No?

Good.

I have told you before and I am going to tell you again it is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement. Of course, you must do so without violation to individual judgment, but only after an impartial consideration of the evidence in the case with your fellow jurors.

You should not hesitate to re-examine your views and change your opinion, if convinced it is erroneous.

Of course, you should not surrender an honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or solely for the mere purpose of reaching a verdict.

[15,155] You will continue your deliberations.

Retire the jury to continue deliberations.

[At 4:10 p.m. the jury was retired.]

The COURT. Gentlemen, after a four-month trial, I have no intention of easily declaring a mistrial. They are going to continue their deliberations.

I am not sure that I didn't make a mistake by cutting off the deliberations at 6:30 at night. I am inclined to go back to the idea that they will take off at 6:30, eat dinner until 8:00 and deliberate until 10:00 and pick up again at 8:00 tomorrow morning.

Mr. BARTLIT. I would only observe that there are a number of old people on that jury. I have no idea which side they are on.

The COURT. Nobody can know.

Mr. BARTLIT. From my point of view, to take a 70-year-old woman and put her through that schedule——

The COURT. I am aware of that.

Mr. BARTLIT [continuing]. Might create a verdict because of exhaustion of that poor person.

The COURT. Mr. Bartlit, this trial has cost somewhere in the vicinity of a million dollars. I don't mean it has cost the Government that [15,156] that much money. It is an expensive matter for the defense and for the prosecution and an expensive matter for the Government itself.

Mr. BARTLIT. I agree with that 100 per cent. My only observation is the matter of this expense and gravity should not be decided because one person is older and can't stand the gaff.

The COURT. You heard what I told them. I have told them what the Third Circuit says I should tell them under the circumstances. I have no way of knowing what they are thinking of or what is causing the problem than anybody else does, but to declare a hung jury and start this thing all over again is a very critical matter of considerable importance to everybody in this room and I am not prepared to do that.

Mr. MCSWEENEY. If the Court please, could we have a moment at least for the defense counsel to confer with each other to determine whether or not we want to make any further remarks on this matter?

The COURT. You sure can.

Mr. MCSWEENEY. If you would, please.

The COURT. Do you want to use the conference room?

Mr. MCSWEENEY. Yes, if we may.

[15,157] The COURT. Go ahead.

Bear in mind I have not decided whether I am going to lengthen the hours of deliberation. I am saying I am going to think of that.

Mr. BARTLIT. That is what my remarks are directed to.

The COURT. I have not said I will do that. I would welcome your suggestions. I am not sure by going the other way and allowing them to have the morning off we have not made some kind of mistake, but I have not decided anything like that as yet.

Mr. MCSWEENEY. I have in mind this has come to us as a matter of first impression.

The COURT. Go right ahead. It has come to me as a matter of first impression, too.

Mr. MCSWEENEY. That is correct.

Thank you, sir.

[Court was recessed.]

[In conference room 4:53 p.m.]

The COURT. Gentlemen, who is——

Mr. MELLOTT. I think I am the one to make the motion.

I would like to move for a mistrial. It is obvious, we believe, that the jury is deadlocked, as they have advised the Court at approximately 4:00 this [15,158] afternoon. That has occurred after Your Honor had on two prior occasions given the charge, first of all in your original charge, then again yesterday afternoon advising them as to their obligation to reach a verdict.

Further, it has been evident for some time that this jury is somewhat exhausted. We believe that further deliberations will result perhaps in a coerced verdict and we therefore move for a mistrial.

I would also mention that we did not have an opportunity prior to Your Honor's delivering the charge with reference to their obligation to reach a verdict, to discuss the matter with Your Honor.

The COURT. I would only point out that I did not charge them as to their obligation to reach a verdict. I charged them as to their obligation to consult with each other, in the specific language specified by the United States Court of Appeals for the Third Circuit. But I clearly pointed out to them they should not abandon their individual positions, if it was—if it was against their conscience.

I at no time said they had a duty to reach a verdict. I said they had a duty to deliberate toward reaching a verdict. I think that would be error, and I did not do that.

[15,159] Mr. MELLOTT. I didn't mean to indicate you used those words. I used that as a short-hand way of referring to the charge Your Honor had given and I believe in all these instances it was similar to the Third Circuit charge, although I was concerned yesterday with the tone of the charge, Your Honor.

I do believe further on the grounds that I have mentioned, a mistrial should be granted.

The COURT. All right.

The motion is denied.

Mr. KECK. Will deliberations continue?

The COURT. Deliberations will just continue.

[At 4:57 p.m. the conference was adjourned.]

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[15,164] [11:35 a.m.]

The COURT. Gentlemen, I have this communication from the foreman of the jury:

> May I, as foreman of the jury, meet with you to discuss the condition of the jury and further guidance?

I have, after conference with the Chief Judge, I have determined first to give you an opportunity to state for the record your thoughts on the matter. Then I am going to call the jury

into the courtroom and ask the jury if this is the desire of the entire jury. I want to be sure this is not the foreman's own idea, but the desire of the entire jury.

I intend to tell the jury, if I do meet with the foreman, I will not be willing to have him discuss any stand of any juror on any particular issue, or indicate in any way what the difficulty of the jury is, but solely for the limited purpose that he has stated.

If I do meet with him, I will meet with him only in the presence of the court reporter. Nobody else will be present. I will impound that record.

Now, I am open to your objections, suggestions or anything else. I am not willing to meet with him in the presence of any counsel, because I am not sure just what he will say. And if he says it just to me, it will be on [15,165] the record, if it should ever become important, but it will be impounded.

Mr. FRICANO. I think what the Court has outlined is the correct way to approach the situation. I see no problem with it.

Mr. BARTLIT. I take it that Your Honor, the purpose is to find out if the jury is in serious physical condition.

The COURT. That is right.

Mr. BARTLIT. Mental or physical condition.

The COURT. I think that is the purpose of it.

I am going to make sure that, first, as I have said, that the jury wants me to do this, the entire jury wants to discuss this, because if it is his own idea, I am not going to do it.

Mr. MCSWEENEY. I take it, Your Honor, that with respect to impounding the transcript, you would do that only if he says something——

The COURT. I will do it under any circumstances. It will be impounded.

Mr. MCSWEENEY. It seems to me if he does not make some statement which would give some indication of a vote or something like that, but merely tells of the [15,166] physical condition of the jury, if he limits himself to that——

The COURT. It can't be that way. I know it is not going to be that way. There is going to be some carryover into things that should not properly be disclosed, I am certain, and I will impound it for review by some other court, if that should ever become necessary.

Mr. McSweeney. Well, all I was going to say, in the event he doesn't—I don't know in advance, of course, what he is going to do.

The Court. Oh, I don't, either.

Mr. McSweeney. I would not think that the transcript should be impounded.

The Court. It is going to be impounded.

See, it is going to be impounded. If he—unless he just tells me they are sick and tired of sitting there and want to go home. Then I will read it to you. But if it is anything of any kind, of a nature I don't think should be discussed, it is not going to be discussed.

Now you have alternatives. I am perfectly willing to write him a note saying, "No," if you object.

If counsel objects to my meeting with him, I will write him a note on here and say no.

Mr. McSweeney. I don't think we object to your meeting with him.

[15,167] Mr. DeLone. I don't object.

The Court. You have to consider the whole thing, that I am going to impound the record. If you object to that, I will merely write him a note and say no.

Mr. Mellott. If Your Honor gives any form of instruction to him——

The Court. Oh, I am not going to give him——

Mr. Mellott [continuing]. I think we ought to know what those are.

I personally am opposed to any repetition of the modified Allen charge. I think it has been done three times.

The Court. If I am going to do that, I will do it in open court, whether you object to it or not. If I am going to do it, I will do it in open court.

Mr. Mellott. I understand, but if all you are going to do is inquire of him, personally, I would be inclined to have you do it without calling the jury into court.

The Court. I have been told I have to call the jury into court and I am inclined to do it.

Mr. Bartlit. I have no objection to the procedure Your Honor spells out.

I would hope afterwards Your Honor could give us, [15,168] without getting into anything sensitive, as to the condition of the jury.

Mr. DeLone. I have no objection to the procedure of first calling the jury in to make sure that the jury, that the foreman is speaking at the request of the jury, nor have I any objection to Your Honor meeting with the foreman to—without our presence, in order to guarantee we would learn nothing about the jury deliberations, but I have no way of knowing—none of us does—he may limit himself to the condition of the jury, as he has said. In that event, it would seem to me the transcript should not be impounded, we should be advised prior to whatever further steps Your Honor may take or instructions, whatever further instructions——

The Court. I will tell you what further instructions I give him, if I give him any. But I will not give him instructions on the law, because I will not discuss that with him.

Mr. DeLone. I would ask before you give further instructions, if there is nothing that reveals the jury's state of mind, we be advised and have an opportunity to confer with Your Honor before you give him further instructions.

The Court. There is only one of two kinds of instructions I can give him. I will tell him [15,169] to go back and continue his deliberations. That is one. And I will tell you if I do that and you can say what you want, or I can—if I reach the conclusion that I should, I will reconsider the motion for a mistrial and I will tell you that and see if anybody wants to make such a motion. I don't know whether anybody wants to make the motion. If they don't make it, I can't discharge the jury.

Mr. DeLone. Until we have the fact of whatever he tells you——

The Court. Maybe the better thing to do, in view of the conditions you are imposing, is for me to write him a note and say, "No."; I am not going to discuss anything with him.

Mr. DeLone. I have not imposed any conditions. I have asked if there is nothing that reveals the deliberations, that we be advised after you have talked to the foreman.

The Court. But you have placed a condition. You said before, before I tell him anything, you want to meet with me and I am not inclined to do that. I would prefer to tell him I don't want to meet with him.

I am perfectly willing to discuss it with you afterwards, but if that is——

Mr. Keck. I would urge that you do meet with him. This might well be his way or the jury's way [15,170] of communi-

cating to you a hopeless deadlock. I would hope you meet with him.

All we are asking is that we be advised of the physical condition, if you learn of it.

The COURT. But I am not willing to have a conference before I talk further to them.

Mr. KECK. I am not suggesting that.

The COURT. Mr. DeLone did.

Mr. DELONE. I did suggest that.

The COURT. I would rather just tell them I won't meet with them.

Mr. FRICANO. If Your Honor please, I believe that the course of action you have outlined, which you have taken up with the Chief Judge, is the proper course of action, and I would urge Your Honor to do just exactly what he has said in an outline form.

The COURT. I want to give Mr. DeLone an opportunity to state his position.

Mr. DELONE. I have stated it. Perhaps, sir, because I have stated only my own view and it is a pretty tense situation we all have, maybe I could have a chance to confer with others who may not agree with me. Maybe I will change my view, if I could have a moment or two to confer with my colleagues.

The COURT. I am going to have the [15,171] jury put in the box to determine whether or not this is their overall view, and you can confer during that period of time. And if it is their overall view, then I will determine whether there is objection to my doing it and——

Mr. MELLOTT. If Your Honor intends——

Mr. DELONE. I take it that will not be done in the presence of the jury?

The COURT. You are meeting already in here.

Mr. MELLOTT. Are you contemplating bringing the jury in without our being in court?

The COURT. No.

Mr. FRICANO. No, no, no. He is going to have the jury——

The COURT. It is going to take a little while to put the jury in court. You people talk and then I will go in and talk to the jury.

[The conference was concluded at 11:43 a.m.]

[In open court, jury present at 11:48 a.m.]

The COURT. Ladies and gentlemen, I have this communication:

> May I, as foreman of the jury, meet with you to discuss the condition of the jury and further guidance?

Now, if I do meet with the foreman, I will not be willing to discuss what issues are being considered, [15,172] what anybody's particular stand is on any particular issue, or how the jury is divided. These are not proper communications. It is not proper for any one to tell anyone how a jury is divided or how they stand.

The FOREMAN. That is understood.

The COURT. I want it thoroughly understood that no one is permitted to do that kind of a thing.

Now, is this the desire of the entire jury that I meet with the foreman of the jury and to discuss these matters?

If it is not anybody's desire, tell me now.

All right. I am going to meet with the foreman of the jury in the conference room with the court reporter present. There will be nobody there but the court reporter and myself. This is going to be done with the consent of all counsel. Counsel is present in the courtroom. I trust that it is being done with the consent of each individual Defendant.

Mr. Brown, is it with your consent?

Mr. BROWN. Yes, sir.

The COURT. Mr. Nicely?

Mr. NICELY. Yes, sir.

The COURT. Mr. Watt?

Mr. WATT. Yes, sir.

[15,173] The COURT. All right.

So that I am going to do this, with the consent of every Defendant. The other corporate Defendants speak through their counsel. I am going to impound the record, so that nobody, at this time, at least, will know the nature of our discussions.

Would you withdraw the jury to the jury room and ask the foreman to meet with me in the conference room.

[At 11:53 a.m. the jury returned to the jury room and the foreman of the jury entered the conference room.]

The COURT. I am going to make one further little request. The jury has indicated a discomfort at the fact that counsel are present when they come in and when they go out. So I have never had this happen before, either. I am going to request that

defense counsel remain in your office in the Porter Building and that no one stay here on this floor in the courtroom until there is a further call, and that Government counsel will remain in their offices, which I believe are on the Fifth Floor.

Mr. FRICANO. Yes, Your Honor.

The COURT. I will ask that no one stay here, because for some reason or other it bothers the members of the jury.

All right.

[15,173a] We will recess now until further call.

I suggest you might want to wait now, because I may want to discuss something with you after I meet with the jury, but after you do leave at noon today, please don't come back until we call you.

[At 11:55 a.m. the Court met with the foreman of the jury.]

[The foreman of the jury returned to the jury room at 12:04 p.m.]

[The Court met with counsel in the conference room at 12:05 p.m.]

The COURT. Gentlemen, the foreman has advised me that because of what he calls personality differences between some of the members of the jury—and I refuse to allow him to tell me what, how many or what the division is or on what kind of issues, but he says because of some kinds of personality differences he does not feel that they are ever going to be able to get over this; that there is no documentary evidence or no testimony that is going to change this.

I gather—and this is pure inference—I am drawing the inference that some people—and I don't know which way, either, in which direction—that some people feel that there are some kinds of problems and that they are not going to get over them. I—the only thing I said, [15,174] I would take it—he also pointed out there are some of the people that are not feeling well, but he says he is not a doctor and he doesn't know if they are sick or aren't sick. Neither am I.

I told them to continue their deliberations. That is just about all I told him. I told him there is nothing more I can tell them; they should continue their deliberations.

Mr. MELLOTT. I wonder if we could have a few minutes for defense counsel to meet with Your Honor?

The COURT. Yes.

[At 12:25 p.m.]

Mr. MCSWEENEY. First, Your Honor, now as Your Honor knows, we had previously asked if we could have this transcript, so I would like to request again now that you actually know what Mr. Russell said, we would again ask, in light of that, may we have that transcript?

The COURT. No.

Mr. MCSWEENEY. We may not have the transcript?

The COURT. No. I indicated why. There are references in that transcript of things I don't think you should know, so I am not going to do that.

Mr. MCSWEENEY. All right.

The COURT. Having told you that, I am surprised you would ask me again. I can't do that.

[15,175] Mr. MCSWEENEY. I see.

Well, we Defendants then move for mistrial on the basis that it appears from what we know, from what Your Honor has told us, and our observations, that the jury is deadlocked and it appears unlikely they would be able to reach a unanimous verdict, apparently even with respect to individual Defendant parties, and therefore there is the danger of the coerced verdict.

The COURT. Is that the view of all the Defendants?

Mr. KECK. Yes, sir.

The COURT. Including the individual Defendants?

Mr. SPRADLING. Yes, Your Honor.

The COURT. Mr. Fricano, what is your opinion?

Mr. FRICANO. My view is, Your Honor——

The COURT. Now let me say this: I am not going to discharge the jury yet. So what I would like now, rather than a view, I would like a view as to how much longer I should let them deliberate before I do this, before I do declare a mistrial, so I will defer action on your motion. I will not deny your motion. I will defer action on your motion.

Now, what I would like to have is something as to——

[15,176] Mr. FRICANO. My recommendation, if Your Honor please, I have given it some thought and I would recommend we go through the rest of this week and the Court give serious consideration to going back to evening hours.

Mr. BARTLIT. My immediate reaction to that is that that is a procedure which would be designed to secure a coerced verdict. I don't think I have to again add up the illnesses and age of

those jurors. I am surprised the Government suggests that. To me, to me, Your Honor, once a jury with a foreman like this has taken the position they have taken, we are passed the point of no return. The risk to set a deadline doesn't accomplish anything, because we are passed the deadline and I would feel—I don't know how it is going to come out, but I think the risk increases hourly that any verdict as a result of somebody not being strong enough to stand by their convictions, I think a mistrial now is required.

The COURT. If I am deferring action on the motion, as I said, does anybody for the defense—you have heard Mr. Fricano's suggestion is we go back to evening deliberations and go through the week. Does any Defendant have any suggestion?

Mr. MELLOTT. Well, Your Honor——

The COURT. Don't argue the other [15,177] points. I just want a suggestion right now.

Mr. MELLOT. I would just like to add one other ground for the motion, and that is there is a danger the verdict will be reached on issues other than those involved in the case.

The COURT. All right. Now——

Mr. MELLOT. But I would oppose going back to evening hours for the same reason Mr. Bartlit did. We have had indication that the jury has physical problems.

The COURT. How about some positive things? I have heard all this. How about some positive thing as to how long to continue.

Mr. KECK. Tomorrow morning, Your Honor.

Mr. BARTLIT. I disagree strongly.

Mr. MELLOTT. I think we have gone far enough now.

Mr. BARTLIT. If we think we have a mistrial now, we can't pick a particular date. That is inconsistent with our motion. That sucks the life out of our motion.

The COURT. I am not going along with John, either. We are not going back to evening deliberations. I will allow the jury to deliberate until Friday. On Friday I will pass on the motion. I will either declare a [15,178] mistrial on your motion on Friday or I will not.

Mr. MELLOTT. Well——

Mr. MCSWEENEY. Your Honor understands, of course, my motion is for an immediate mistrial.

The COURT. I understand. But I am not passing on it yet. I am deferring judgment on your motion.

Mr. MELLOTT. I want to be sure, Your Honor understands as far as I am concerned, I think it has gone far enough as of now.

The COURT. That closes the record.

Mr. DELONE. I would like the record to reflect I share the view we have passed the point where we are able to do it.

Mr. KECK. I believe the same thing. I think the Government's position is extremely unreasonable.

The COURT. Does anybody else want to say anything about anything?

All right. That closes the record.

[At 12:30 a.m. the Court was in recess.]

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[15,183] [Court reconvened at 10:45 a.m. o'clock. Jury was present.]

The COURT. Good morning, ladies and gentlemen.

Mr. Foreman, has the jury reached a verdict?

The FOREMAN. Yes, they have.

The COURT. Will you hand them to the bailiff, please.

Publish the verdict, please.

Mr. GRAINER. Members of the jury impaneled in the case of the United States of America, plaintiff and Defendants United States Gypsum Company, National Gypsum Company, Georgia-Pacific Corporation, the Celotex Corporation, Andrew J. Watt, Colon Brown and Jay P. Nicely at Criminal No. 73-347, you say you find Defendant United States Gypsum Company as to Count 1 guilty, Defendant National Gypsum Company as to Count 1 guilty, Defendant Georgia-Pacific Corporation as to Count 1 guilty, Defendant The Celotex Corporation as to Count 1 guilty, Defendant Andrew J. Watt as to Count 1 guilty, Defendant Jay P Nicely as to Count 1 guilty, Defendant Colon Brown as to Count 1 guilty, so say you all.

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[15,193] The COURT. In other words, the jury is excused, but you are welcome to remain in the jury box during the imposition of sentence, if you see fit.

All right. I am going to impose sentences at this time.

Mr. SPRADLIN. Your Honor, are you receptive to certain motions that are normally made at this time?

The COURT. Yes.

Mr. SPRADLIN. On behalf of my two clients, I wish to submit an acquittal notwithstanding the verdict.

The COURT. You may file them with the clerk, sir.

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[15,196] • • •

Mr. SPRADLIN. I would ask Your Honor to bear in mind this trial, lasting, as it has, some four months, has been a peculiarly difficult ordeal for these men.

[15,197] The COURT. I am aware of it.

Mr. SPRADLIN. One which I suppose is unique. I personally do not know of any criminal proceeding involving two individual men which has lasted this long, which has involved this much sacrifice, both personally and financially, and I respectfully submit that if sentence is to be imposed now, it be as lenient as possible.

The COURT. Mr. Brown, is there anything you wish to say?

Mr. BROWN. No, sir, I don't know what I would say, sir.

The COURT. It is adjudged that the Defendant, upon the verdict of guilty, is adjudged guilty and is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of six months and fined the sum of $50,000.

The execution of the sentence of imprisonment is suspended and the Defendant is placed on probation for a period of three years on the following terms and conditions:

One, he obey all local, state and federal laws; two, he comply with the rules and regulations of the Probation Department; three, that the fine imposed be paid within the term of the probation and that it be paid out of the personal assets of the Defendant, and he not accept reimbursement directly or indirectly from any employer. [15,198] The Defendant is to pay his share of costs.

Mr. Nicely.

The COURT. Gentlemen, Mr. Brown, I must advise you under the law you have a right to appeal to the United States Court of Appeals for the Third Circuit. The costs are to be paid during

the term of the probation, and I am required to tell you if you are unable to afford counsel, you will be provided with counsel by the Government.

Mr. Nicely.

Do you have anything to say, counsel?

I am assuming, too, your character is of the highest quality.

Mr. SPRADLIN. In this respect, I would adopt the remarks I made with regard to Mr. Brown, and I bring Your Honor's attention that here we do not have a chief executive officer of the corporation and I would ask Your Honor to remember the evidence of the case. I will say the paucity of evidence of the case, in rendering the action you are about to take.

The COURT. Mr. Nicely, is there anything you care to say before sentence?

Mr. NICELY. No, sir.

The COURT. It is adjudged that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of six months, and is fined the sum of $1,000. [15,200] Execution of the sentence to prison is suspended and the Defendant is placed on probation for a period of one year on the following terms and conditions:

That he obey all local, state and federal laws; he comply with the rules and regulations of the Probation Department; that the fine imposed be paid within the term of probation and that it be paid out of the personal assets of the Defendant and he may not accept reimbursement directly or indirectly from his employer. The Defendant is to pay his share of the costs during the prosecution.

You have the right to appeal to the United States Court of Appeals for the Third Circuit from this sentence, and if you are unable to afford counsel, the Court will provide you with counsel.

Mr. Watt.

Mr. BARTLIT. Your Honor, I would say for Mr. Watt that the most eloquent thing that I could say for him would be overshadowed by his testimony in his own behalf from that witness stand, which I believe demonstrated him to be a man of immense voracity and integrity. I think that is better than anything I can say for Mr. Watt.

The COURT. I think you know I have had the advantage of a pre-sentence report concerning Mr. Watt.

[15,209] • • •

The COURT. I will talk to Mr. Quinn [15,210] and see the view of the Court of Appeals.

Is there any other matter anybody wanted to take up?

Mr. MCSWEENEY. Yes, Your Honor.

First I would move—I would move that Your Honor immediately make available to us the transcript of the colloquy between Your Honor and the Foreman, Mr. Russell, which we were not—when we were not present.

The COURT. Mr. McSweeney, I am not going to make that available. If the Court of Appeals thinks that should be made available, they can do it. I personally am not going to make it available, because I think that indicates the views of particular jurors at the particular time that that was taken, and I just don't see any point of that kind of thing. If the Court of Appeals feels differently, I am sure they will give it to you.

Is there anything else now?

Mr. MELLOTT. Yes, Your Honor.

In view of the developments that have occurred during the course of the—just prior to the jury deliberations and during the deliberations with reference to the problems that existed both as to the physical condition of the jurors and the information which we had as to the fact that they were no longer talking about the evidence; that they could no longer reach a verdict, on that basis—[15,211] and they were considering personalities and compassion for each other—we believe it to be very essential that we be given the right to talk to the jurors, since they have been discharged, and we therefore request Your Honor permit us to do so.

The COURT. You may address in that regard the Court of Appeals, as far as I'm concerned. I asked the jurors—remember, your first contention was they had pre-judged the case and you asserted that fairly vigorously. I think the fact that they deliberated for a week shows they hadn't pre-judged the case very much.

I charged them, I think, pretty carefully on that. I think I charged them pretty carefully on how they were to arrive at a verdict. We polled the jury. I see no reason to talk to individual jurors.

Mr. DELONE. There is a further reason I would join in Mr. Mellott's request, sir, and that is there is the further question as to whether there were any extraneous influences which affected the jury's verdict or their deliberations.

The COURT. Such as?

Mr. DELONE. Very specifically, the question of publicity and whether any publicity about the case and about the prior pleas and about the civil litigation and how it was disposed of came to the attention of the jurors [15,212] at any time prior to their verdict. And I know no way that we can investigate that, as I believe is our right, and expressly provided for in the new rules of evidence other than——

The COURT. I guess it is the new rules. I am not certain it is the right rules.

Mr. DELONE. I can find it for you.

The COURT. Mr. DeLone, let me say this: I asked the jury that. I questioned about pre-trial publicity. We questioned them as recently as just before they went out to deliberate on whether they had talked to any person. We put them under oath and asked each individual whether they had and they said no. I see no point to infringing upon the secrecy of the jury by asking that kind of question. Therefore, I will not permit any of these jurors to be asked any kind of a question by counsel.

Mr. MELLOTT. In other words, are you ordering us not to talk to the jurors?

The COURT. I am ordering you not to talk to the jurors about anything that happened during the deliberations.

Mr. MELLOTT. Suppose the juror calls us, we are directed not to talk to them?

The COURT. You are directed not to talk to them.

[15,213] Mr. MELLOTT. I object to that. I think it infringes on my client's rights and my rights.

• • • • • •

[15,227] • • •

The COURT. I will tell you we are not faced with a problem we are often faced with where there is no transcript. We have a running transcript. Every one of you have one. Therefore, I will not extend the time in which to file motions.

Mr. DELONE. I don't think that is necessary, Your Honor.

The Court. All right.

Now if you wish to file briefs on this, briefs must be filed within two weks after the filing of the motions.

Mr. Spradlin. Your Honor, in my motion, which I don't believe you have had an opportunity to read, I pointed out the complexity of the issues, the volume of transcript. We have 77 volumes of transcript now. I requested that if the motions were not granted without argument and briefing, that that be set not later than 60 days.

The Court. I want to get this moving, because you gentlemen will have all the opportunity in the world to look into all those complicated problems and briefs before—if you have to argue, before the Court of Appeals, and let me say this: First of all, I am [15,228] satisfied that this was a jury question. Therefore, I am not granting any motions for judgment of acquittal. I am just not going to. I am satisfied, as I was previously, that it was a jury question. It was a question for the jury. What is presented as to the procedures during the trial, I did my very best to conduct the trial in accordance with law. If I did not, the Court of Appeals will be in a position to say so. So you can—I will not tell you you can't file motions with me. You can. I will, if I get them, I will pass on them. But I think that the matters to which you alluded should be properly brought up at the Court of Appeals.

Mr. Fricano, do you have anything further?

• • • • •

QUESTIONS SUBMITTED BY JURY

Define Robinson Patman Law.

Define "meeting competition in good faith."

Your Honor, On your final charge to us and even during the trial, did you tell us to listen to the answers and make our inferences from them more than from the questions asked? Some of the documents to clarify certain matters we just can't seem to find so in this case must we have a document for proof? or must we rely on the witness' answers and take from that whether or not we thought the witness was truthful or not, taking into consideration his position in his company.

Should the jury decide the case on the documents & testimony presented in the courtroom as evidence between Dec. 27, 1968 and Dec. 1973?

Your Honor, We cannot reach a unanimous verdict. If any juror changes his mind now, he would only change due to compassion for his fellow jurors.

Your Honor, May I as foreman of the Jury meet with you to discuss the condition of the Jury and further guidance.

G. D. Russell
Foreman

Order (12/16/75)

ORDER OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 16, 1975.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 75-1836-42.

United States of America
v.
United States Gypsum Company, et al., etc.

Present Seitz, *Chief Judge*, Gibbons and Garth, *Circuit Judges*.

ORDER

Ordered that Appellants' joint motion to have the subpoenaed documents involved in the evidentiary hearing made

available to appellants is referred to the merits panel for disposition, since such panel will have the benefit not only of inspection but of briefing on those merits and can order supplemental briefing if it grants the motion; and it is

FURTHER ORDERED that appellants' joint motion for disclosure of impounded transcript of the conversation between the District Court and the foreman of the jury, which took place on July 14, 1975, is granted.

By THE COURT,
COLLINS J. SEITZ,
Chief Judge.

DATED: September 16, 1975

Judge Garth would deny the motion for disclosure of the impounded transcript. In Judge Garth's view, the unanimous consent of the defendants to the meeting by the District Court Judge with the jury foreman, and the defendants' failure to object to the District Court's proposed procedure (including the impounding of the transcript), which procedure was announced to the jury in counsels' presence, amounted to an unqualified and unconditional waiver fully supporting the District Court's action.

TRANSCRIPT OF THE CONVERSATION BETWEEN THE DISTRICT COURT AND THE FOREMAN OF THE JURY, JULY 14, 1975.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CR 73-347.

THE UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM, et al., DEFENDANTS.

Transcript of proceedings held in conference room July 14, 1975 at 11:55 a.m. before the Honorable Hubert I. Teitelbaum.

MARION C. WIKE,
Official Reporter.

[2] PROCEEDINGS

[Present: The foreman of the jury and the Court.]

The COURT. What is your problem, sir?

Mr. RUSSELL. I have two problems. And first of all, if I refer to a juror with a sexual gender, I would like it struck, because I would like to say juror.

The COURT. In other words, if he says he or she, make it neutral.

Mr. RUSSELL. The two problems are health and the status of the count.

The COURT. You can't tell me that now.

Mr. RUSSELL. I am not going to tell you what the status is in no way. In fact, I can't tell you, because I can't remember.

The COURT. All right.

Mr. RUSSELL. But first of all, I would like to thank you for that 6:30, because I don't think you would have a jury left. I am not a doctor, but these people are getting very distraught. It is not that they go into a depression and stay there; they go into a depression and they're coming out high. Now I would say at least eight of the jurors are taking some kind of pill. Some of the pills have been even issued by the doctor downstairs. I am not a doctor and I can't judge these things, but I have seen one of [3] these jurors at one time I thought she was going to jump out the window. And I, just for my own sake, without telling you this, I cannot take the responsibility that this could happen. I know this is part of Mr. Keene's job, but like I say, they go high and low, and sometimes by the time I get to Mr. Keene and get him down there, they are perfectly normal again.

In fact, one of the instances was when I saw this one girl——

The COURT. May I ask this: If we discharged—we can excuse one juror for health reasons. Is there any juror we could excuse that would help the situation? If it is more than that, there is no point.

Mr. RUSSELL. I think there is more than that, Judge. I am not a doctor, so I can't say. I'm not even sure these are true sicknesses. They seem—I mean, with the high and low, they seem induced, but when a person thinks they are sick, they're generally sick.

The COURT. It is just as bad, if they think they are.

Mr. RUSSELL. As I say, I am not a doctor. I don't like to be a judge, but I think for my own sake, my feelings, it is my responsibility as foreman to tell you these things. I do not want to be responsible for anybody's health.

The COURT. I don't, either.

[4] You recall, though, that before—when I had two alternate jurors, I asked all the jurors if there was anybody who was not physically able to go ahead and everybody wanted to do it.

Mr. RUSSELL. I realize that. I think every juror out there wants to do their duty.

The COURT. See, we have tried this case now for four months.

Mr. RUSSELL. This is part of it, I will grant you, but it is not the whole part of it. There is some personality conflicts on the jury that have led to certain situations and I think we have overcome those.

The COURT. If we continue to deliberate from 9 to 6:30, with a lunch hour, for a while longer——

Mr. RUSSELL. What I want to tell you next is—and that is, again, my opinion—and you can tell me I am wrong—and I have to look at it in a different way. We have taken enough ballots now, and we have had enough discussions, and the way it is divided is not going to be settled by any document, any remembrance of testimony. It is based on a belief and even if they—even if they would sign a document today, and you would ask me to get up in the jury box and swear I think this is a true and just verdict, I would have to say no, because I believe in the twelve or multiple system of a jury; that if we are to decide beyond a [5] reasonable doubt, when you get twelve, or whatever the number has to be——

The COURT. That is what you have to decide.

Mr. RUSSELL. ——it proves it beyond a shadow of a doubt.

The COURT. Not beyond a shadow of a doubt.

Mr. RUSSELL. I know. Each individual proves it to himself, but for a man to be convicted guilty, or the company, we do it beyond a reasonable doubt, but if you have twelve, you know

it is beyond a shadow of a doubt and you cannot have any conscience over it as far as a juror or anything else. That is the way I feel, Judge.

The COURT. What are you suggesting?

Mr. RUSSELL. I am asking you what I should do. I am to the point——

The COURT. I would like this jury to deliberate longer. I say that because, as I say, we have tried it for a considerable period of time.

Mr. RUSSELL. Everybody realizes that and I do.

The COURT. We have individual people here who are concerned and the jury has now deliberated—they deliberated three full days, Wednesday, Thursday and [6] Friday. They deliberated a half a day on Saturday and a half day on Sunday. They are not deliberating a full day, because jurors usually deliberate until eleven or ten at night.

Mr. RUSSELL. We know that and we want to thank you.

The COURT. You have not deliberated that long yet.

Mr. RUSSELL. I know that is the way you would like it, but what I am trying to tell you is I don't think deliberation is going to change it. It is not a matter of time anymore.

The COURT. Are you telling me this jury is hopelessly deadlocked and will never reach a verdict?

Mr. RUSSELL. In my opinion, it is. I have to rely on that. I have no experience in this kind of thing. I don't know what people go through in a jury. This is the first time I have ever served on one and it is a new experience and I will never forget it. But it is a terrible responsibility and what I said, if it was a matter of finding a document or finding a part of a testimony that would convince somebody, I would say sure, and good.

The COURT. All right.

For the time being continue your deliberations. I will take into consideration what you have told me.

[7] Mr. RUSSELL. As I said, the health problem is something that I think has to be looked at. I don't know how you are going to judge this or whether you call Mr. Keene and ask him or the Marshal's opinion, but I think something ought to be done.

The COURT. All right. I will take it into consideration. I have to talk to counsel.

Mr. RUSSELL. I appreciate that. I didn't expect a decision, but I would like some kind of guidance.

The COURT. I would like to ask the jurors to continue their deliberations and I will take into consideration what you have told me. That is all I can say.

Mr. RUSSELL. I appreciate it. It is a situation I don't know how to help you get what you are after.

The COURT. Oh, I am not after anything.

Mr. RUSSELL. You are after a verdict one way or the other.

The COURT. Which way it goes doesn't make any difference to me.

Mr. RUSSELL. They keep saying, "If you will tell him what the situation is, he might accept it."

I said, "He doesn't want to know. He told me that he doesn't want to know what the decision is."

[8] The COURT. No, I don't want to know that. It would not be proper for me to know.

Mr. RUSSELL. You may imply something from what I said.

The COURT. I can imply something from just watching, but I don't want you to tell me. That would be a breach of your duty.

Mr. RUSSELL. I have told you as best I can.

The COURT. Thank you. You tell them to keep deliberating and see if they can come to a verdict.

[At 12:04 p.m. the jury foreman returned to the deliberation room.]

Certified true and correct transcript.

/s/ MARION C. WIKE
Marion C. Wike
Official Reporter

[1] DEFENDANTS' REQUEST FOR FINAL JURY INSTRUCTIONS

I. INTRODUCTION

At the beginning of this trial, you will recall that I instructed you generally with regard to defendants' rights, their presumption of innocence, the nature of this action and the charges against each defendant. At that time I also instructed you that defendants are charged with a criminal violation of the anti-

Defendants' requests for instructions are, of course, on the assumption that there is a case to go to the jury. In fact, defendants contend that there are no issues remaining for resolution by the jury because, they respectfully submit, their motions for judgment of acquittal should have been granted. These motions will be renewed at the close of the evidence. These requests are also on the assumption that, if there is a case to go to the jury, it will be submitted on the basis of all the evidence presently in the record. Defendants adhere to their position that certain evidence should be stricken from the record and disregarded by the jury.

trust laws and that the burden is on the [2] Government to prove each element of that offense beyond a reasonable doubt and to a moral certainty. You have now heard all of the evidence and also have heard counsel for the Government and counsel for each defendant state his summation of the evidence which has been presented.

It is now my duty to instruct you again in order that you will apply the rules of law and render your verdict accordingly.

Unless otherwise stated, you should consider each instruction to apply separately and individually to each defendant in the case.

Teitelbaum, J., Preliminary Instructions to Jury, Tr. 128 *et seq.* (hereafter "Preliminary Instructions").

[3] II. Role of Jurors as Fact-Finders

REQUEST 1

You, the jury, are the sole judges of the facts. It is up to you to find out what happened in the case and apply the law which I give you to the facts you find. Nothing that I have said during trial, no question which I have asked, no ruling that I have made, no statement I make in this charge, is intended in any way as an intimation of what determination of this case you should make.

If in the course of these instructions, and if during the trial, I have said anything that indicates to you how I might feel or how you think I feel with respect to the evidence or some aspect of the evidence in this case, you should disregard my actions or statements and rely upon your own recollection of the evidence. What I have said from time to time, what I may say in this charge, or what counsel have said during the course of the trial or during their summations, is not to be taken in place of your own recollection of the facts or the evidence in this case.

Nor are you to take into account or consider in any respect the rulings made on various motions and objections by counsel. Counsel have the right to object to any testimony or exhibit offered by the opposing party. My rulings, therefore, related solely to matters of law with which you have no concern. You must disregard questions and answers to which [4] objections were made and sustained. Similarly, if after a question was asked and an answer given, the answer was ordered stricken from the record, disregard the answer as well as the question. The same applies where I have instructed you to disregard testimony relating to a particular issue or event. Counsel have relied upon you to follow my instructions with regard to testimony which has been stricken. If they were not able to rely upon you in this respect, they might well have asked additional questions or put in additional evidence; so you must follow my directions.

Nor are you to draw any conclusions from the fact that the Court asked certain questions. This was solely to elicit facts.

Adapted from Preliminary Instructions, Tr. 142–43; *Adams Dairy Co. v. St. Louis Dairy Co.*, 260 F. 2d 46 (8th Cir. 1958), ABA Antitrust Civil Jury Instructions, p. 132 (hereafter "ABA Civil Jury Instructions"); *Moody v. United States*, 377 F. 2d 175, 179 (4th Cir. 1967). *United States v. Interborough Delicatessen Dealers Ass'n, Inc.*, 62 Civ. 515 (S.D. N.Y. 1966), 10080-10081.

[5]

REQUEST 2

Counsel, in arguing this case to you, have commented upon and argued the facts, as is their privilege and their duty. If you find any variance between the facts testified to by the witnesses or as shown by the documentary evidence, and what has been stated to you by counsel to be the facts, you should be guided by your recollection of what the evidence is and your own judgment as to the credibility, value and significance of the evidence.

Continental Ore Co. v. Union Carbide & Carbon Corp., 280 F. 2d 86 (9th Cir. 1961), *rev'd on other grounds*, 370 U.S. 690 (1962), ABA Civil Jury Instructions, p. 130.

[6] III. The Nature and Function of the Indictment

REQUEST 3

There are seven defendants in this action. Four defendants are corporations and three are private individuals. Each has been charged with a conspiracy in violation of the federal antitrust laws in an Indictment.

Each of the defendants has pleaded not guilty to the charges against them. Consequently, the Government, in order to support a verdict of guilty, must prove each element of the charges beyond a reasonable doubt and the Indictment is not and may not be considered to be any evidence supporting any of these elements.

Preliminary Instructions, Tr. 133; *United States v. American Tobacco Co.*, Crim. 6670 (E.D. Ky. 1940), *aff'd*, 147 F. 2d 93 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1946), ABA Jury Instructions in Criminal Antitrust Cases, p. 164 (hereafter "ABA Criminal Jury Instructions"); *United States v. Foster*, 9. F.R.D. 367, 377 (S.D.N.Y. 1949).

[7]

REQUEST 4

The Indictment defines the exact nature of the charges against defendants in this case. You may only evaluate the evidence in this action on the basis of questions raised in the Indictment—that is, you must determine whether it is proved be-

yond a reasonable doubt to your satisfaction that defendants are guilty of those charges specified in the Indictment. The defendants are entitled to rely upon the Indictment as a fair statement of the issues in this case and may not be convicted upon other allegations and charges for which they have not been indicted. Defendants thus may not be found guilty of offenses not charged in the Indictment.

In applying this instruction you must understand that the Indictment charges one single overall conspiracy that allegedly continued without interruption from 1960 to 1973. The government thus has the burden of proving beyond a reasonable doubt that there was one single conspiracy, as charged; that if there were such a conspiracy, it was a continuing one; and that all claimed conspiratorial acts, if any, were within the common understanding of the parties. Even if every action alleged by the government to have been done was in fact done by defendants, there could be no violation of the Sherman Act unless those actions were done pursuant to a single unitary agreement beforehand to take those actions. If, for example, you find that there [8] were separate and individual conspiracies or different conspiracies on separate points then you must acquit the defendants.

Kotteakos v. United States, 328 U.S. 750 (1946); *United States v. Central Supply Ass'n*, 6 F.R.D. 526, 528-33 (N.D. Ohio); *United States v. Johns-Manville Corp.*, Crim. 21-118 (E.D. Pa. 1962); ABA Criminal Jury Instructions, pp. 512-13.

[9] IV. Contentions of Defendants

REQUEST 5

The defendants maintain that they never entered into any conspiratorial agreements and did *not* agree among themselves to raise, fix, maintain and stabilize the prices, terms or conditions of sale of gypsum board. Defendants contend that the gypsum pricing and marketing decisions of each of them were made on the basis of their own independent business judgments and that their decisions were reached as a result of individual appraisals of market conditions including an appraisal of what their competitors had done, what they were doing, what they would or could do in the future or what they might be thought likely to do in the future. Defendants presented a great volume of evidence to show that the gypsum industry was highly competitive, particularly during the statutory period after December 27, 1968. Defendants contend that this evidence shows overwhelmingly that their decisions were made independently and created vigorous competition and that this evidence is totally inconsistent with any conspiracy to fix the prices, terms or conditions of sale of gypsum board.

[10] REQUEST 6

Unless you are convinced beyond a reasonable doubt and to a moral certainty that defendants did not act independently for business reasons and that the defendants actually acted pursuant to a conspiracy as alleged, then you must find defendants not guilty.

[11] V. Essential Elements of the Offense

REQUEST 7

I would now like to briefly summarize the essential elements of the charge in this case about which I will instruct you more fully later on. In order to convict any defendant of the offense charged in this indictment you must find, beyond a reasonable doubt and to a moral certainty, that all of the following essential elements are present:

First, there must be evidence which convinces you beyond a reasonable doubt, that a conspiracy existed to fix the prices, terms or conditions of sale of gypsum board. A unilateral attempt to stabilize prices is not illegal (Tr. 12,704).

Second, the evidence must convince you, beyond a reasonable doubt, that the conspiracy existed after December 27, 1968 and that the particular defendant was a party to it, after December 27, 1968.

Third, the evidence must convince you, beyond a reasonable doubt, that any such conspiracy among defendants constituted a single, overall continuing conspiracy and not a series of separate, isolated agreements.

Fourth, there must be evidence which convinces you, beyond a reasonable doubt, that the particular defendants knowingly and consciously joined in and committed themselves to the conspiracy charged in the indictment.

[12] Fifth, there must be evidence that convinces you, beyond a reasonable doubt, that an act in furtherance of the

conspiracy occurred in the Western District of Pennsylvania at some time after December 27, 1968.

With respect to the corporate defendants, there is a sixth element which you must find. You must find, beyond a reasonable doubt, that the actions of the corporation's officers or employees on which you may consider a finding of conspiracy, if any, were authorized or ratified by the corporation itself.

With respect to the individual defendants, you may not hold them responsible or accountable for the actions of any subordinate or co-employee unless you are first persuaded beyond a reasonable doubt that the individual defendant knowingly adopted or authorized such actions and understood them to be pursuant to a common conspiracy, if any.

As I have said, before you find any defendant guilty you must find all of these elements present, beyond a reasonable doubt, as to that defendant. Even if only one of these elements is not present beyond a reasonable doubt, you must find the defendant not guilty.

[13] REQUEST 8

Under the law, a conspiracy is a combination of two or more persons to accomplish by concerted action some unlawful means. So a conspiracy is a kind of partnership in criminal purposes in which each member becomes the agent of every other member. The gist of the offense is an agreement to disobey or to disregard the law.

In the absence of agreement, there can be no conspiracy. It is the existence of an agreement to act together, to cooperate in the future for an unlawful purpose, that constitutes the relationship forbidden by law.

No conspiracy in violation of the Sherman Act can be found unless it is established beyond a reasonable doubt that there is conscious and knowing commitment by each member of the alleged conspiracy to an agreed-upon plan or scheme to accomplish an unlawful objective.

Unless each person understands, from something said or done by the others, that he is committed to the scheme and committed to each other participant in the scheme there can be no conspiracy and, thus, no violation of the Sherman Act. And, it is not only necessary that each person understand his own commitment to the scheme but, by something said or done, he must communicate his commitment to the others and each must then [14] believe and understand that they are all bound together and comitted to an agreed-upon scheme. A defendant cannot be convicted unless the evidence convinces you beyond a reasonable doubt that that defendant knowingly committed itself to an unlawful agreement, as charged.

It is necessary for the prosecution to prove an intent to agree or conspire. This is because the government must establish as to each defendant a conscious, knowing commitment to agree. There is no such thing as an unwitting, unknowing or accidental conspirator.

Preliminary Instructions, Tr. 132–133, and further adapted from *United States v. American Tobacco Co.*, *supra*, ABA Jury Instructions, pp. 169–170. See also *Theatre Enterprises, Inc., v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *United States v. Standard Oil Co. (Ind.), Works, Inc.*, 323 F. 2d 787, 791 (3d Cir. 1963); *United States v. Continental Baking Co.*, 281 F. 2d 137 (6th Cir. 1960); *United States v. Van de Carr*, 343 F. Supp. 993 (C.D. Cal. 1972); *United States v. National Malleable & steel Castings Co.*, 1957 Trade Cas., Par. 68,890 (N.D. Ohio 1957), *aff'd* 358 U.S. 38 (1958); *United States v. General Motors*, Crim. 47140 (E.D. Mich. 1973).

[15] REQUEST 9

In determining if the prosecution has established knowing and conscious agreement of each defendant, you may consider among other facts the extent to which he was acting on advice of counsel. Of course, it is no excuse if counsel erroneously said it was lawful to agree. However, in determining if there was a knowing and conscious intent to agree in taking any particular action it is relevant to consider if that action were taken on the advice and initiative of counsel. If counsel initiated or approved a particular action, practice or plan, this fact may be considered in determining whether the particular action, practice or plan was the product of agreement with a competitor or occurred for some independent, lawful reason. The activity of counsel in initiating or approving any action or plan may also be considered by you in determining whether a defendant participated in such action or plan as part of any conscious participation in a conspiracy or, instead, participated in such action or plan because of the advice of counsel, or for some other lawful reason.

[16] REQUEST 10

We are concerned in this proceeding only with the Sherman Act, not with any company's policy. Accordingly, your instructions as to the applicable antitrust law will be taken from me and not from statements of the law contained in any company antitrust policy. For that reason, the fact standing alone that any company's policy may or may not have been violated cannot be considered as evidence of a violation of the Sherman Act or any other law.

[17] REQUEST 11

If a company is acting independently, arriving at its decisions and actions independently without any understanding or agreement, then it is acting lawfully, even if its actions are identical to the actions of its competitors. And even if, naturally enough, it is very interested in what its competitors are doing and keeps an eye on the actions of the competitors to see what effect those actions might have on its own position in the competition, this is perfectly lawful. Therefore, even if defendants' actions were identical and even if each defendant knew what the others were doing, if you find that the defendants acted independently of each other, then you must return a verdict of "not guilty".

Pevely Dairy Co. v. United States, 178 F. 2d 363, 368–70 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950); *United States v. Eli Lilly and Co.*, 1959 CCH Trade Cases Par. 69,536 (D.N.J. 1959); *United States v. Sherwin-Williams Co.*, Crim. 12789 (W.D. Pa. 1948), ABA Criminal Jury Instructions, pp. 298–99.

[18] REQUEST 12

You are instructed, moreover, that there is no law of the United States which sets the price at which gypsum board must be sold, any more than there is any law setting the price at which any other product must be sold; neither is there any law establishing the market in which any company should sell its products. In a free economy, any person or company may sell its products at any price at which it desires to sell, and may sell such products in any market which it desires to enter, so long as such prices are not the product of a conspiracy. Similarly, any person or company is free to make and publicly announce its pricing and other marketing decisions with the hope or expectation that such decisions and announcements will have the effect of raising or stabilizing prices, provided that such decisions were not made pursuant to any agreement with any competitor. You have heard evidence of the price controls imposed by the United States on August 15, 1971 and for several years thereafter, and that such controls restricted the freedom of defendants in pricing their products. Except for this period of price controls, therefore, throughout the entire period involved herein, each defendant had the right to offer its products for sale at such price as it desired.

As long as he does not enter into a collusive agreement with other manufacturers, a manufacturer can try to obtain a profit and is entitled to attempt to obtain as good a price as possible for the sale of his product.

[19] VI. Consciously Parallel Action

REQUEST 13

The Indictment charges that pursuant to the alleged conspiracy, the defendants conspired and agreed to publish uniform list prices. There is evidence that at various times the published list prices of the corporate defendants were virtually identical.

However, similarity of competitive business practices, or the mere fact that defendants may have charged identical prices for the same goods and services, does not establish a conspiracy, since such practices of business concerns are consistent with ordinary competitive behavior in a free and open market. A business concern may copy a list price of a competitor, or follow and conform exactly to the price policies and price changes and credit terms of its competitors, and that, without more, would not be a violation of the law.

Competition will ordinarily cause one producer to charge about the same price that is charged by any other. Thus, similarity of pricing may inevitably result from active, free and unrestrained competition where the general business or economic climate affects competing firms in a similar way.

[20] The Sherman Act does not establish any standard of required competition in a particular industry. Indeed, it does

not by its terms refer to competition at all. The level or nature of competition in a particular industry may be considered together with other facts in determining whether there is any restraint from which a conspiracy may be inferred, but the level or the nature of competition is not itself the ultimate test of a violation of the Sherman Act. On the contrary, the Sherman Act only prohibits conspiracies in restraint of trade.

Theatre Enterprises, Inc. v. Paramount Film Distributors Corp., 346 U.S. 537 (1953); *Cement Manufacturers v. United States*, 268 U.S. 588, 605 (1925); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F. 2d 199, 202–3 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962); *United States v. American Tobacco Co., supra*; *A. L. B. Theatre Corp. v. Loew's, Inc.*, 355 F. 2d 495 (7th Cir. 1966); *Independent Iron Works, Inc.* v. *United States Steel*, 322 F. 2d 656, 665 (9th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963); *Lawlor v. National Screen Service Corp.*, 270 F. 2d 146; 155 (3rd Cir. 1959), *cert. denied*, 362 U.S. 922 (1960); *United States v. General Motors*, CRIM. 47140 (E.D. Mich. 1973); ABA Criminal Jury Instructions, pp. 169–70.

[21] REQUEST 14

In this regard, the law recognizes that the fortunes of the sellers of any commodity are often interdependent. Each is required as a matter of practical business practice to take into account the policy of its competitors in determining its own policies. For that reason, proof that defendants gave consideration to how their respective competitors would react to any decision which it might make with regard to price concessions, may not be considered by you as proof of agreement or conspiracy. The fact that a competitor considers all market facts, including likely or possible competitive reactions to a particular decision, does not establish that a conspiracy has been formed so long as the particular decision resulted from the independent judgment of the manufacturer and not from a pre-existing agreement.

Pevely Dairy Co. v. United States, 178 F. 2d 363 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950). *United States* v. *General Motors*, CRIM. 47140 (E.D. Mich. 1973).

[22] REQUEST 15

Parallel business behavior may be no more than common business solutions of economic problems in a highly competitive area. Intelligent businessmen frequently are aware of the

action of their competitors, and similarity of conduct which is the result of independent judgment in response to a common business problem is not a violation of the antitrust laws. Therefore, you should not infer a conspiracy merely because these defendants may have taken similar action in response to a particular economic condition, for example, excess capacity, low rates of return, or the entry of a new competitor in the marketplace.

Adapted from *Elder-Beerman Stores Corp. v. Federated Department Stores, Inc.*, Civil No. 3067 (S.D. Ohio 1969); *rev'd on other grounds*, 459 F. 2d 138 (6th Cir. 1972) ABA Civil Jury Instructions, pp. 15–16; *United States v. General Motors Corp.*, 1974–2 CCH Trade Cases ¶97,656 at pp. 97, 670–71 (E.D. Mich. 1974); *Independent Iron Works, Inc. v. United States Steel Corp.*, 177 F. Supp. 743, 746–48 (N.D. Cal. 1959), *aff'd*, 322 F. 2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (2963); *Lawlor v. National Screen Service Corp.*, 270 F. 2d 146, 155 (3d Cir. 1959); *cert. denied*, 362 U.S. 922 (1960).

[23] REQUEST 16

Similarly, a manufacturer may lawfully make and release a pricing decision to its customers even though it seems likely that competitors will learn of the announcement from field contacts and even though the manufacturer believes, based on its independent determination, that competition may reasonably be expected to follow. The fact that competitors—in the exercise of their own judgment—have decided to follow the prices of another manufacturer does not establish a price fixing conspiracy.

United States v. General Motors, CRIM. 47140 (E.D. Mich. 1973); *United States v. International Harvester Co.*, 274 U.S. 693, 708–9 (1927); *Cole v. Hughes Tool Co.*, 215 F. 2d 924, 940–41 (10th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955).

[24] REQUEST 17

By the same token, a price announcement by one competitor cannot immobilize or prevent another competitor from independently deciding whether to adopt the same or a similar price increase. Thus, any defendant hearing of a price announcement or other statement by another defendant or competitor is not thereby prevented from acting in a normal business fashion as its interests might dictate, which includes acting to fol-

low that announcement, so long as there was no pre-existing commitment or agreement that such action would be taken.

United States v. Standard Oil, 316 F. 2d 884, 896 (7th Cir. 1963); *United States v. General Motors*, CRIM. 47140 (E.D. Mich. 1973).

[25] REQUEST 18

There is evidence of certain business dealings among defendants including the buying and selling of materials, such as gypsum wallboard, gypsum rock, gypsum paper and mineral wool. You are instructed that such business transactions between competitors, and the various communications between them which go hand in hand with such business relationships, are entirely lawful and cannot be considered by you in determining the question of guilt or innocence.

[26] VII. ASSOCIATION WITH COMPETITORS

REQUEST 19

In this case the government has introduced evidence of conversations and contacts among defendants and between defendants and other competitors. In many cases the evidence consists merely of the fact that a meeting occurred, or that a meeting was scheduled, with no evidence of what transpired at that meeting. I instruct you that the mere fact that defendants may have met with each other does not prove conspiracy. Further, you are instructed that unless there is evidence that at any particular meeting things were said or done which constituted conspiratorial activity such contacts must be presumed innocent.* Without proof that a meeting involved the fixing of gypsum board prices or terms, you may not consider the mere fact of such a meeting as evidence that those present engaged in the conspiracy charged in the indictment. A defendant cannot be found guilty of conspiracy merely by association.**

* *United States v. Basurto*, 497 F. 2d 781, 793 (9th Cir. 1974); *United States v. Kompinski*, 373 F. 2d 429, 434 (2nd Cir. 1967); *United States v. Van de Carr*, 343 F. Supp. 993, 1001 (C.D. Cal. 1972); *United States v. Falcone*, 311 U.S. 205, 210 (1940); *Dennert v. United States*, 147 F. 2d 286 (6th Cir. 1945).

** *United States v. Packard-Bell Electronics Corp.*, Cr. 30158 (S.D. Cal. 1961), ABA Criminal Jury Instructions, p. 472; *United States v. Dide*, 332 U.S. 581, 593, (1948); *United States v. Stromberg*, 268 F. 2d 256, 267 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959), *United States v. Baker*, 499 F. 2d 845, 848 (7th Cir. 1974); *United States v. Minneapolis Electrical Contractors Ass'n*, 99 F. Supp. 75 (D. Minn. 1951), *appeal dismissed*, 207 F. 2d 782 (8th Cir. 1953), ABA Criminal Jury Instructions, p. 323; *United States v. Johns-Manville Corp.*, Cr. 21-118 (E.D. Pa. 1962), ABA Criminal Jury Instructions, p. 501.

[27] REQUEST 20

The exchange of information between competitors as to past or present quotations or prices, or price lists, or terms or conditions of sale, is not unlawful. It is not the purpose of the Sherman Act to inhibit the intelligent conduct or business operations through the free distribution of knowledge of all the essential factors entering into a commercial transaction. This is true even though the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade practice.

Maple Flooring Ass'n v. United States, 268 U.S. 563, 582-84 (1925); *Cement Manufacturers Protective Association v. United States*, 268 U.S. 588, 606 (1925).

[28] VIII. STATUTE OF LIMITATIONS

REQUEST 21

In assessing the evidence which you have heard in this case, it is essential for you to correctly apply the Statute of Limitations. The term has a simple but important meaning: In a criminal case no defendant can be convicted for an offense if that offense occurred more than a certain specific period of time before the date the defendant was charged by the Government.

The Statute of Limitations for the offense charged in the indictment is five years. This means that you can not find the defendants guilty unless you find beyond a reasonable doubt that the conspiracy charged continued or existed within the

period beginning December 27, 1968 and ending December 27, 1973, which is the date on which the indictment was filed.

The Statute of Limitations is an important and centuries-old concept in our system of justice. It embodies the common sense recognition that, after a certain period of time, because of the dimming of memories, the death of pertinent witnesses and the loss of pertinent documents, it is extremely difficult to determine precisely the facts that occurred at an earlier date, and thus unfair to put a person to trial on stale and half-forgotten evidence. Of course, it is crucial in a criminal case, such as [29] this case, to determine clearly and precisely all the facts at issue.

For these reasons, it is most essential that you correctly apply the period of the Statute of Limitations in your deliberation of the charges in this case.

Toussie v. United States, 397 U.S. 112, 114–115 (1970).

[30] REQUEST 22

In this case the statute of limitations has run on all acts taking place before December 27, 1968. Accordingly, unless you find that the evidence in this case proves beyond a reasonable doubt and to a moral certainty the conscious and knowing participation of a defendant after December 27, 1968, in a single unitary conspiracy beginning sometime prior to that date, you must return a verdict of not guilty as to that defendant.

There is a great deal of evidence in the case relating to activities of the defendants before December 27, 1968 but you must clearly understand that you cannot convict the defendants for any such activities. This evidence was admitted because the Government has alleged a conspiracy which began before December 27, 1968 and continued after that date. In attempting to prove that a conspiracy existed after December 27, 1968, the Government was entitled to attempt to prove when, if ever, the alleged conspiracy began and what its purpose was. Thus, you may refer to such earlier acts, and consider them in reaching your verdict, only if you find that there is proof beyond a reasonable doubt that the conspiracy charged was in existence after December 27, 1968.

Therefore, you may not find any defendant guilty based on such earlier acts, whether such acts were lawful or unlawful,

[31] unless you further find that the charged conspiracy did exist after December 27, 1968. And, in order to consider any act prior to December 27, 1968, those acts must be part of the same conspiracy, if any, which existed after December 27, 1968, and which had continued beyond that date without interruption.

The prosecution must fail if it relies on circumstantial evidence of the results of prior conduct and does not affirmatively prove beyond a reasonable doubt that the alleged conspiracy existed in the statutory period.

United States v. Johns-Manville Corp., *supra*, ABA Criminal Jury Instructions, p. 496; *Grunewald v. United States*, 353 U.S. 391, 396 (1957); *United States v. Kissel*, 218 U.S. 601, 607 (1910); *United States v. Borelli*, 336 F. 2d 376, 385 (2d Cir. 1964); *United States v. Johnson*, 165 F. 2d 42, 45 (3d Cir. 1947), *cert. denied*, 332 U.S. 852 (1948); *United States v. Boyle*, 338 F. Supp. 1028, 1036 (D.D.C. 1972); cf. *United States v. General Motors Corp.*, 121 F. 2d 376, 408 (7th Cir. 1941), *cert. denied*, 314 U.S. 618.

[32] REQUEST 23

Moreover, for any defendant to be found guilty it must be shown that the particular defendant intentionally performed, after December 27, 1968, an overt act designed to aid in achieving the goals of an illegal agreement, as charged. Such an overt act is an act in furtherance of a conspiracy.

The type of overt act which is required within the statute of limitations period only can be an act which is consistent, beyond a reasonable doubt, with no other conclusion except a conclusion of conspiracy. When two inferences can reasonably be drawn as to an overt act, one pointing to guilt and one to innocence, then that act is not sufficient to establish the existence of a conspiracy within the statutory period.

Thus, for example, the fact that defendants circulated price lists or made sales of gypsum board within the statutory period is not enough to support an inference of conspiracy, since these acts are normal business activities which would be equally consistent with the absence of conspiracy.

See *Malagon-Ramirez v. United States*, *supra*, 605; *United States v. Interstate Engineering Corp.*, 288 F. Supp. 402, 409 (D.N.H. 1967); *United States v. Delay*, 440 F. 2d 566, 568 (7th Cir. 1971); *United States v. Ortiz*, 445 F. 2d 1100, 1103 (10th Cir. 1971); *United States v. Stubin*, *supra*, 465 n. 7; Devitt & Blackmar, *Federal Jury Practice and Instructions*, *supra*,

11.01; Preliminary Instructions, 136–36; *United States v. Standard Oil Co. (Indiana)*, Cr. 11365 (E.D. Wis. 1936), *rev'd sub nom. United States v. Socony-Vacuum Oil Co.*, 105 F. 2d 809 (7th Cir. 1939), rev'd 310 U.S. 150 (1940), ABA Criminal Jury Instructions, p. 88.

[33] REQUEST 24

There is an additional requirement, one which is required by the Constitution of the United States, namely that there must be proof beyond a reasonable doubt that during the five year statutory period the defendants committed an act in furtherance of the conspiracy within the Western District of Pennsylvania, which embraces roughly the Western third of Pennsylvania. For an act to be in furtherance of the conspiracy it cannot be just any sort of an act of a defendant in this District, but it must be an act which you find was for the purpose of and did carry out the conspiracy.

If you do not find that any overt act within the statutory period, that is, after December 27, 1968, was committed within the Western District of Pennsylvania, then you must acquit all of the defendants.

American Tobacco Co. v. United States, 147 F. 2d 93, 120 (6th Cir. 1944), *aff'd on other grounds*, 328 U.S. 781 (1946).

[34] REQUEST 25

Even if you find the existence of a conspiracy formed before December 27, 1968 and continuing thereafter you must acquit any defendant if it appears that he withdrew from such a conspiracy prior to the December 27, 1968 date. To withdraw from a conspiracy, a conspirator must take affirmative action. Resumption of competitive behavior, such as intensified price cutting or price wars, could constitute such affirmative action. If there is a reasonable doubt as to whether a defendant has withdrawn from the conspiracy charged, if any existed, prior to December 27, 1968, that defendant must be acquitted.

See *Marino v. United States*, 91 F. 2d 691, 698 (9th Cir. 1937), *cert. denied sub nom. Gullo v. United States*, 302 U.S. 764 (1938); *United States v. Gilbert*, 31 F. Supp. 195, 202 (S.D. Ohio 1939).

[35] IX. VERIFICATION

REQUEST 26

There has been evidence in this case of a defendant contacting a competitor to verify the existence or nonexistence of a

reported lower price or other competitive condition in the market place. This practice has been referred to as "verification." The evidence shows that verification was engaged in as a method of compliance with the Robinson-Patman Act and to protect defendants from misrepresentations by customers.

Accordingly, I charge you as a matter of law that the verification contacts of the defendants were legal and may not be a basis in whole or in part for a finding of guilt against any defendant.

[36] REQUEST 27

There has been evidence in this case of a defendant contacting a competitor to verify the existence or nonexistence of a reported lower price or other competitive condition in the market place. This practice has been referred to as "verification." There is evidence that verification was engaged in by defendants for the purpose of compliance with the Robinson-Patman Act, one of the federal antitrust laws. I charge you as a matter of law that no finding of guilt may be made in this case based on verification engaged in for the purpose of compliance with the Robinson-Patman Act. Further, to consider verification as any evidence whatsoever of an alleged price-fixing conspiracy you must first determine beyond a reasonable doubt that the purpose of verification was *not* compliance with the Robinson-Patman Act.

In order to consider verification in this case, I must instruct you in general on the requirements of the Robinson-Patman Act but I emphasize that it is not part of your consideration in this case as to whether the defendants did or did not violate the Robinson-Patman Act. The relevancy of the Robinson-Patman Act is in consideration of the purpose for which verification was conducted.

Requests 27 through 32 should be considered only if 26 is not given.

[37] REQUEST 28

Although the Robinson-Patman Act is a complex law, its basic purpose is to prevent unfair discrimination in selling prices charged by a seller to different customers. However, under this law, a seller is permitted to sell to a particular customer at a lower, or discriminatory, price if that seller is in

good faith meeting the equally low price offered by a competitor to the same customer. Compliance with these provisions of the Robinson-Patman Act requires the seller to investigate or verify whether his competitor actually has offered a lower price to the customer, before the seller lowers his own price. The customer's oral statement to the seller's salesman ordinarily is not sufficient to satisfy this requirement. The seller must take further steps to verify or he will not be considered to have acted in "good faith" as required by law.

The defendants in this case contend, and have offered evidence to show, that the verification in which they engaged was for the purpose of complying with the requirements of the Robinson-Patman Act which I just outlined for you.

Verification for the purpose of compliance with one law, the Robinson-Patman Act, cannot constitute a [38] violation of another law, the Sherman Act, which prohibits a conscious commitment to a price fixing agreement. These defendants simply cannot be convicted under one law for conduct made necessary by another law. Thus, if in your consideration of the evidence relating to verification, you find either that the purpose of verification was compliance with the Robinson-Patman Act or that there is reasonable doubt that verification was *not* for the purpose of such compliance, you cannot consider verification as any basis in whole or in part of a finding of guilt of any defendant.

Viviano Macaroni Co. v. FTC, 411 F. 2d 255, 259 (3d Cir. 1969); *see also, FTC v. A. E. Staley Manufacturing Co.*, 324 U.S. 746, 759–60; *Surprise Brassier Co. v. FTC*, 406 F. 2d 711, 714–16 (5th Cir. 1969); cf. *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295, 313 n. 10 (N.D. Cal. 1971).

Wall Products Co. v. National Gypsum Co., supra, 312–13; *Belliston v. Texaco, Inc.*, 455 F. 2d 175, 181–82 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972); *Gray v. Shell Oil Co.*, 469 F. 2d 742, 747 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); *Webster v. Sinclair Refining Co.*, 338 F. Supp. 248, 251–52 (S.D. Ala. 1971); *Cement Manufacturers Protective Ass'n v. United States*, 268 U.S. 588, 603–04 (1925).

[39] REQUEST 29

Apart from compliance with the Robinson-Patman Act, it is also perfectly legal for one or more defendants to verify prices or credit terms in order to protect themselves against fraud on

the part of their customers. So if you find that the price and credit verification activities of the defendants were intended to guard against customers attempting to extract price or credit concessions by misrepresenting terms available to them from other suppliers, or if there is a reasonable doubt as to whether that was the purpose of such verification, then you must find that no violation of the law occurred on this aspect of the case even if you find that such price or credit verification was the product of an agreement among one or more defendants.

Cement Manufacturers Protective Ass'n v. United States, 268 U.S. 588, 602–6 (1925); *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295, 315 (N.D. Cal. 1971).

[40] REQUEST 30

In considering the verification practice in the context of this case, you are required to do so in full recognition of the applicable statute of limitations about which I have previously charged you more fully. The relevant verification contacts for this case are those occurring after December 27, 1968. Verification contacts prior to December 27, 1968 may be considered by you, if at all, only as background information to be such help as they may be in evaluating verification during the statutory period after December 27, 1968. Verification prior to December 27, 1968 may not be the basis of a finding of guilt in this case.

[41] REQUEST 31

Before concluding my instructions regarding verification and the Robinson-Patman Act, I want to put the matter of verification in context in this case. Even if you should find beyond a reasonable doubt that verification was not for Robinson-Patman Act purposes, it does not follow that verification constitutes a violation under the Sherman Act, as the Government charges. As I have previously instructed you, the exchange of information between competitors as to past or present prices, or other terms or conditions of sale, is not by itself improper or illegal. Therefore even if you find beyond a reasonable doubt that verification was not for Robinson-Patman compliance, you cannot find a Sherman Act violation unless you find beyond a reasonable doubt that each defendant consciously committed itself to a price-fixing conspiracy and that the verifica-

tion contacts of the defendants were part of their conscious commitment to that conspiracy.

[42] REQUEST 32

Finally, if you find pursuant to my previous instructions that the verification contacts of the defendants may not be a basis for a finding of guilt, then I charge you that there is no other evidence in this case upon which you may base a conclusion beyond a reasonable doubt of a price fixing conspiracy and accordingly you must then return a verdict of not guilty as to each of these defendants.

[43] REQUEST 33

There also has been evidence concerning a practice of requesting verification of customer statements that they had been extended job price protection. For example, it is undisputed that U. S. Gypsum listed specific job contracts protected with Arthur Andersen in December, 1965, and informed its competitors that they could ascertain whether a particular job was protected by calling Arthur Andersen. You are instructed that the practice of listing or exchanging information with regard to protection on specific job contracts is not unlawful and cannot form the basis for a finding of guilt even if it were done by agreement and even if it tended to bring about price uniformity or price stabilization.

[44] X. MATERIALS HANDLING

REQUEST 34

There is evidence in the record concerning materials handling practices, such as the use of pallets. The defendants have denied the existence of any agreement on materials handling, and you may very well find that no such agreement existed.

As I have already instructed you, there is nothing illegal in the defendants having identical conditions of sale such as shipping wallboard on pallets or not shipping wallboard on pallets. Nor is it illegal for one defendant to stop shipping on pallets

and then others to stop using them. Such facts do not establish a conspiracy in violation of the Sherman Act.

Cement Manufacturers Association v. United States, 268 U.S. 588 (1925); *United States v. Container Corp.*, 393 U.S. 333, 335 (1969).

Even if you do find that an agreement on methods of materials handling did exist and continued after December 27, 1968, you may not convict defendants unless you further find that the purpose and necessary effect of that agreement was to fix, raise or maintain prices of gypsum board. A mere agreement on materials handling, for example, an agreement to eliminate pallets, even if the effect of it was to increase the profits of the agreeing defendants, furnishes no basis to convict a defendant in this case. You may not consider such evidence, unless you find that an agreement concerning materials handling went beyond materials handling and had the further purpose and necessary effect of fixing the price of gypsum board. Therefore, if any agreement concerning materials handling practices did not [45] have the effect of fixing prices, it must be totally disregarded by you and cannot be considered in determining the guilt or innocence of any of the defendants. Further, an agreement as to any materials handling practice, if made by defendants to protect themselves from theft, conversion, or non-return of their property by customers, is lawful.

Teitelbaum, J., Tr. 10,038–10, 041; *United States v. National Malleable Steel Castings Co., supra; Tag Manufacturers Institutes v. FTC, supra.*

[46] XI. PREDATORY ALLEGATIONS

REQUEST 35

The Sherman Act does not protect any single competitor from the effects of competition. In the competitive struggle, some competitors are going to lose sales and others are going to gain sales. Regardless of the size or power of any competitor in the market, the law does not guarantee to any person, no matter how large or how small that person or corporation may be, an unchanging status quo.

[47] REQUEST 36

You are instructed that price reductions, unloading allowances, efforts to improve customer service or other marketing actions in themselves, if taken independently by an individual manufacturer, and if made in order to meet competition in the field or to retain customers or to gain new customers, are not illegal.

Thus, if you find that a particular defendant's price reductions or other marketing actions were made independently, such evidence cannot be the basis for a finding against that defendant.

[48] REQUEST 37

You are instructed that the law does not prevent a manufacturer who sells in several states from unilaterally selling at different prices in different marketing areas.

[49] XIa. VARIANCE BETWEEN INDICTMENT AND EVIDENCE

REQUEST 38

The defendants may not be found guilty of offenses not charged in the indictment. The defendants are entitled to rely upon the indictment as a fair statement of the issues in this case, and it would be fundamentally unfair and a violation of the defendants' constitutional rights to convict them of anything but the precise offense charged in the indictment.

Kotteakos v. United States, 328 U.S. 750 (1946); *United States v. Russano*, 257 F. 2d 712, 715 (2d Cir. 1958); *United States v. Central Supply Ass'n, supra*, 528–33; *United States v. Johns-Manville Corp.*, Crim. 21–116 (E.D. Pa. 1962), ABA Criminal Jury Instructions, pp. 512–513.

[50] REQUEST 39

The indictment in this case charges the defendants with engaging in a continuing agreement, understanding and concert of action to fix the prices, terms and conditions of sale of gypsum board begining sometime prior to 1960 and continuing thereafter until at least some time in 1973. Under the rule which I have just stated, the Government must prove beyond a reasonable doubt the existence of a continuing conspiracy as charged and not some other agreement or conspiracy.

For example, and I don't mean to suggest that this is the case, assume that there was an agreement to fix prices which was formed in 1960, but was dissolved or terminated in 1966, and then a separate agreement to fix prices which was formed in 1967 and another one in 1971. This would *not* be enough to support a finding of guilt in this case, since there would not be a single continuing conspiracy as was charged in the indictment. In short, if you find a series of separate and unrelated conspiracies over the years covered by the evidence, rather than a single, continuous conspiracy as charged in the indictment, then you must find the defendants not guilty.

[51] You must not infer from that statement that I have an opinion as to whether the evidence shows any type of conspiracy to fix prices at any time. I do not mean to intimate any such opinion. I have simply given you this as an illustration of the kind of variance between the proof and the charge which the law does not allow. To succeed with its prosecution, the Government must prove the violation which it charges, not some other violation.

Kotteakos v. United States, 328 U.S. 750 (1946); *United States v. Russano*, 257 F. 2d 712, 715 (2d Cir. 1958); *United States v. Central Supply Ass'n, supra*, 528–33; *United States v. Johns-Manville Corp.*, Crim. 21–118 (E.D. Pa. 1962), ABA Criminal Jury Instructions, pp. 512–513.

[52] XII. JOINDER OF CO-CONSPIRATORS

REQUEST 40

If you find from the evidence beyond a reasonable doubt that a continuing conspiracy existed to fix the prices, terms and conditions of sale for gypsum board, then you must consider whether each defendant joined in such a conspiracy.

In this regard the burden is on the Government to prove, beyond a reasonable doubt, first, that any party alleged to have joined in an illegal conspiracy had actual knowledge of the unlawful conspiracy and, second, that such person knowingly and intentionally participated in the unlawful conspiracy.

A person who has no knowledge of an illegal conspiracy, but happens to act in a way which furthers an objective or purpose of that conspiracy, does not by such conduct become a co-conspirator. A party cannot knowingly participate in a conspiracy unless he is aware of it. He must exchange mutual commitments with the parties to an existing conspiracy in such [53]

United States v. Packard-Bell Electronics Corp., Cr. 30158 (S.D. Cal. 1961), ABA Criminal Jury Instructions, p. 475; Devitt & Blackmar, *Federal Jury Practice and Instructions*, § 23.09; *United States v. National City Lines*, 186 F. 2d 562, 572 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951); *United States v. Ward Baking Co.*, 224 F. Supp. 66, 69 (E.D. Pa. 1963).

a way that they understand that he, too, is committed to them and their scheme.

United States v. DiRe, 159 F. 2d 818, 819 (2d Cir. 1947), *aff'd*, 332 U.S. 581 (1948); *United States v. Falcone*, 109 F. 2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940); *Klein v. American Luggage Works, Inc.*, 323 F. 2d 787, 791 (3d Cir. 1963); *United States v. Standard Oil Co.*, 316 F. 2d 884, 890 (7th Cir. 1963); *United States v. General Motors Corp.*, 1974-2 CCH Trade Cases 75,253 at p. 97,670 (E.D. Mich. 1974); *United States v. American Tobacco Co., supra*, ABA Criminal Jury Instructions, 169–70.

[54] REQUEST 41

Mere knowledge, approval or acquiescence in the object of a conspiracy does not make one a party to the conspiracy. Instead there must be an agreement to cooperate in achieving the object of the conspiracy.

The burden is upon the Government (1) to prove the existence of an unlawful conspiracy beyond a reasonable doubt, (2) to prove actual knowledge of the unlawful conspiracy on the part of any party alleged to have joined therein, and then (3) to prove that each such person knowingly participated in the unlawful conspiracy.

Unless each element of proof has been established beyond a reasonable doubt as to a particular defendant, that defendant must be found not guilty.

United States v. Downen, 496 F. 2d 314, 318–19 (10th Cir.), *cert. denied*, 419 U.S. 897 (1974); *United States v. Edwards*, 488 F. 2d 1154, 1158 (5th Cir. 1974); *United States v. Mendez*, 496 F. 2d 128, 130 (5th Cir. 1974); *Kotteakos v. United States*, 328 U.S. 750 (1946); *Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc.*, 459 F. 2d 138, 146–147 (6th Cir. 1972).

[55] XIII. TRADE ASSOCIATION ACTIVITIES

REQUEST 42

Evidence has been presented in this trial regarding the activities of the Gypsum Association.

Because of this evidence I must instruct you that it is perfectly lawful for any company or any person to be a member of one or more trade associations, or to participate in their meetings, or any of their other activities, including activities of committees of the trade association.

A trade association such as the Gypsum Association may legally educate its members in the proper conduct of their businesses. There is nothing illegal or improper if the purpose or the result of such an educational program is to convince an individual or a company that the practices advocated by the association are more sound than the prevailing practice in the industry, or that a practice opposed by the association is later recognized by an individual or a company to be an unsound business practice.

Neither is there anything illegal or improper in the association seeking to educate or persuade persons who are not [56]

See *United States v. General Motors*, Crim. 47140 (E.D. Mich. 1973); *United States v. Sherwin-Williams Co., supra*, ABA Criminal Jury Instructions, p. 294.

members of the association that a prevailing business practice is either sound or unsound.

United States v. Minneapolis Electrical Contractors Ass'n., Crim. 8161 (D. Minn. 1951), ABA Criminal Jury Instructions, p. 321. *United States v. General Motors*, Crim. 47140 (E.D. Mich. 1973).

[57] REQUEST 43

The Gypsum Association had the right to reach and to attempt to reach the objectives of its membership by legitimate persuasion and reasoned argument. To this end, its employees and members had the right to tell their side of the story and to persuade others, including customers, as to proper means of handling and shipping wallboard, and to use peaceful persuasion, publicity, articles in publications of the Association, and

all lawful means of persuasion to convince the manufacturers and customers of the superiority of certain handling methods.

They had the right to write letters or make other statements among themselves or to other members of the industry or the public generally, expressing disapproval of or opposition to particular handling methods.

United States v. American Medical Ass'n, Crim. 63221 (D.D.C. 1938), *aff'd*, 130 F. 2d 233 (D.C. Cir. 1942), *aff'd*, 314 U.S. 519 (1943), ABA Criminal Jury Instructions, pp. 135–137; *United States v. General Motors*, Crim. 47140 (E.D. Mich. 1973).

[58] XIV. Defendants' Responsibilities for Acts of Agents

REQUEST 44

As I said earlier, there is an additional element which you must find before you can find any of the corporate defendants guilty of the charges against them.

A corporation is in law a person but, of course, it cannot act otherwise than through its directors or officers or employees or other agents. A corporation is not criminally responsible for any unlawful act of the directors or officers or employees or other agents unless such unlawful act was done within the scope of their authority.

Before you may consider any conspiratorial act or statement of defendants' respective employees binding upon any defendant, you must, therefore, first find beyond a reasonable doubt that the employee was authorized to act or speak on behalf of the defendant or that the act or statement was actually adopted by the authorized officials of the corporation after it was done. Otherwise, you may not consider what was said and done by defendants' employees, and you must put aside such unauthorized act or statements because they cannot be used against these [59] corporate defendants.

United States v. Sherwin-Williams Co., *supra*, ABA Criminal Jury Instructions, pp. 272–73; *Flintkote Co. v. Lysfjord*, 368, 383–84 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); *Continental Baking Co. v. United States*, 281 F. 2d 137, 148–49 (6th Cir. 1951); *Holland Furnace Co. v. United States*, 158 F. 2d 2, 8 (6th Cir. 1947); *United States v. Ward Baking Co.*, 243 F. Supp. 713, 717–18 (E.D. Pa. 1965); Restatement of Agency 2d, § 34 comment g (1958).

[60] REQUEST 45

Where evidence is presented as to what one employee may have said, you must determine whether such statement was made under circumstances which require his employer to accept responsibility for it. In any large business corporation having hundreds or thousands of employees there will be many diverse views and opinions among employees as to what the business enterprise should do, how it should go about accomplishing its purposes, and what its business intentions and objectives should be. Before you can conclude that an employee's statement is binding on the corporation as determining its business policy or intention you must first consider whether that employee's responsibility and authority are such that he is in a position to determine the corporation's policy or purpose for it. For example, it may be the duty of an employee to make proposals and suggestions to his superiors for their consideration, but if he does not have the ability or authority to implement his own suggestion, then his suggestion does not become the policy or purpose of the corporation until it is approved and adopted by someone who does have that power.

United States v. General Motors, Crim. 47140 (E.D. Mich. 1973); *Continental Baking Co. v. United States* 281 F. 2d 137, 148–49 (6th Cir. 1951); *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 349, 352–53 (D. Mass 1950), and authorities cited therein.

[61] REQUEST 46

Mr. Watt, Mr. Brown and Mr. Nicely as corporate directors or officers cannot be held criminally responsible for the acts of other corporate directors, officers or agents unless it is established beyond a reasonable doubt by independent evidence that each of them is a member of a conspiracy.

An individual defendant cannot be found guilty by you merely because of the position he holds in the corporation, nor for the performance of purely ministerial acts taken in his corporate capacity. Merely by his employment or association with a defendant corporation, an individual defendant is not responsible for and may not be held liable for the actions of co-employees, including subordinates, which may have been committed without his authorization and without his under-

standing them to have been in furtherance of the alleged conspiracy. Guilt cannot be imputed to an officer of a corporation for the illegal acts of others unless you first find from independent evidence that the other persons were conscious participants in the conspiracy charged, that their actions were in furtherance of such a conspiracy, and that the corporate officer had consciously committed himself to participate in such a conspiracy. [62] Therefore, you are not warranted in finding any individual defendant guilty upon any of the charges unless the evidence satisfies you beyond a reasonable doubt that an unlawful conspiracy existed; that he knew of the existence of the alleged conspiracy; and that he consciously joined a scheme to accomplish a criminal or unlawful purpose or to accomplish some purpose, not itself criminal or unlawful, by criminal or unlawful means.

That is an essential part of the law by which you are to consider the evidence in this case in respect to the individual defendants, remembering that each of them is entitled to the benefit of the law in reference to the presumption of innocence and the standard of reasonable doubt.

Adapted from *United States v. American Tobacco Co.*, Crim. 6670 (E.D. Ky. 1940), *aff'd* 147 F. 2d 93 (6th Cir. 1944), *aff'd* 328 U.S. 781 (1946), ABA Criminal Jury Instructions, p. 182; *United States v. E. I. duPont de Nemours & Co.*, Crim. 878–C (D.N.J. 1942), ABA Criminal Jury Instructions, p. 231; *United States v. The Kansas City Star Co., et al.*, Crim. 18444 (W.D. Md. 1953), ABA Criminal Jury Instructions, p. 356. See also *United States v. Wise*, 370 U.S. 405, 416 (196); *United States v. Ward Baking Co.*, 224 F. Supp. 66 (E.D. Pa. 1963); "Jury Instructions and Forms," 27 F.R.D. 39, 125.

[63] XV. Separate Consideration of Each Defendant

REQUEST 47

In any mass anti-trust trial such as this one, there is danger that a defendant will not be judged solely on the basis of the evidence applicable to him. In this regard, you must consider the evidence as to each defendant separately. You have two questions to determine. First, whether or not there was a conspiracy of the character alleged in the Indictment; and, second, if so, which of the defendants were knowing participants in it? This involves an examination of the evidence separately with

respect to each defendant. Each defendant has the right to have you consider the evidence from his point of view; that is, you are to consider whether or not the evidence shows him individually guilty or not. And, unless you are convinced beyond a reasonable doubt of the guilt of a defendant, you must return a verdict of not guilty.

Adopted from *United States v. Baumgartner*, Cr. 16267 (N.D. Ill. 1927), ABA Criminal Jury Instructions, p. 36; *United States v. Standard Oil Corp.*, Cr. 2199 (N.D. Ind. 1958), ABA Criminal Jury Instructions, p. 103.

[64]

REQUEST 48

Several of the defendants in this case are corporations. In your determination of the issues in this case, you should give no consideration whatsoever to this fact. A corporation is entitled to the same fair trial at your hands as is a private individual. All persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

Estate of LeBaron v. Rohm & Haas Co., 441 F. 2d 575 (9th Cir. 1971,) ABA Civil Jury Instructions, p. 138; see *United States v. American Tobacco Co., supra*, ABA Criminal Jury Instructions, pp. 174–75.

[65] XVII. Direct and Circumstantial Evidence

REQUEST 49

There are two kinds of evidence—direct and circumstantial evidence. Direct evidence is that sort of evidence by which a fact is proved directly and without inference from other facts, and is usually given by witnesses who saw, heard, or otherwise observed some particular fact or occurrence. Circumstantial evidence is that sort of evidence by which an inference of an unknown fact is drawn from the existence of known facts.

United States v. Standard Oil Co. (Indiana), Cr. 11365 (E.D. Wis. 1936), *rev'd sub nom. United States v. Socony-Vacuum Oil Co.*, 105 F. 2d 809 (7th Cir. 1939), *rev'd*, 310 U.S. 150 (1940), ABA Criminal Jury Instructions, p. 88.

[66]

REQUEST 50

In this case the Government has not attempted to prove the existence of an express agreement by direct evidence. No

witness has testified that any defendant agreed to fix, raise or maintain the price of gypsum board. Thus, the alleged agreement must be proved, if at all, from circumstantial, or indirect, evidence.

[67] REQUEST 51

When a criminal charge is sought to be sustained by circumstantial evidence, the proof must meet two requirements. First, all the facts and circumstances proved must be consistent with the commission of the offense charged in the indictment. Second, you must be satisfied beyond a reasonable doubt and to a moral certainty that the facts and circumstances proved can have no reasonable interpretation other than commission of the offense charged.

When two inferences can reasonably be drawn from the same facts, one pointing to guilt and other to innocence, it is your duty to adopt the innocent inference.

United States v. General Motors, CRIM. 47140 (E.D. Mich. 1973); *United States v. Delay*, 440 F. 2d 566, 568 (7th Cir. 1971); *United States v. Ortiz*, 445 F. 2d 1100, 1103 (10th Cir. 1971); *Holland v. United States*, 348 U.S. 121, 135 (1968); *United States v. Standard Oil Co. (Indiana)*, CR. 11365 (W.D. Wis. 1936) *rev'd sub nom. United States v. Socony-Vacuum Oil Co.*, 105 F. 2d 809 (7th Cir. 1939), *rev'd* 310 U.S. 150 (1940), ABA Criminal Jury Instructions, 89.

[68] REQUEST 52

An inference can be drawn only from definite facts in evidence, and cannot be based on surmise, speculation, conjecture or suspicion; it must be reasonably drawn from, and supported by the facts on which it purports to rest.

An inference to be reasonable must be consistent with all the evidence. A fact may not be inferred from a proven fact where the record contains unimpeached and uncontradicted testimony which is inconsistent with such an inference.

In addition, in a criminal case, you are not permitted to draw an inference upon an inference. Having drawn one inference from a set of facts you cannot draw another inference from that inference.

Pennsylvania R. Co. v. Chamberlain, 228 U.S. 333, 340–41 (1933); *Byrth v. United States*, 327 F. 2d 917, 920 (8th Cir. 1964), *cert. denied*, 377 U.S. 931 (1964); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, [first trial] 308 F. 2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); [second trial] 223 F. Supp. 712 (E.D. Tenn. 1963), 346 F. 2d 661 (6th Cir. 1965), *cert. denied*, 382 U.S. 904 (1965).

[69] REQUEST 53

To illustrate what I mean by my instruction that you cannot base an inference on an inference, I will refer you to instances where from sufficient evidence you might infer that a meeting occurred between representatives of defendants. Having made that inference, you must not speculate and further draw any inferences as to what was or was not discussed at such meeting in the absence of evidence as to what was actually discussed on such occasion. Thus, inferences based solely on other inferences are too conjectural and speculative to satisfy the reasonable doubt standard and must not be considered by you in evaluating the evidence.

[70] REQUEST 54

Finally, an inference of a continuous course of conduct or corporate policy cannot be drawn from isolated instances, particularly where there is evidence to the contrary. The isolated occurrence of a particular type of event or act once or twice, for example, would not support an inference of a corporate policy to engage in such acts over a long period of time. Where an event or act may appear to have been in violation of stated company policy, you must not infer, in the absence of other evidence, that there was a corporate policy or course of conduct consistent with the act or event and you must consider whether the event or act was in fact not authorized by the company.

Timken Roller Bearing Co. v. F.T.C., 299 F. 2d 839 (6th Cir. 1962).

[71] XVIII. DUTY OF JURY TO DISREGARD INFORMATION FROM OUTSIDE THE RECORD

REQUEST 55

In reaching your verdict, you may only consider the testimony and exhibits which have been introduced into evidence in this case. You must disregard any information about the

case which may have been received from sources outside of this trial.

Paramount Loew's (Syndicated Theatres, Inc.) v. Warner Bros., (D. Ind. 1963), ABA Civil Jury Instructions, pp. 145–46; Devitt & Blackfar, *Federal Jury Practice and Instructions*, § 10.03.

[72] REQUEST 56

It is, members of the jury, not only the right but the duty of counsel to make objections during a trial whenever in his judgment evidence was being offered contrary to law, rules or procedure, as he in his best judgment interprets them. You are not to allow yourselves to be swayed in your honest judgment by or because of any objections of counsel for either the Government or any of the defendants throughout the trial.

Nor are you to take into account or consider in any respect the rulings made on various motions and objections by counsel. Counsel have the right to object to any testimony or exhibit offered by the opposing party, and my rulings related solely to matters of law with which you have no concern.

United States v. General Motors, Crim. 47140 (E.D. Mich. 1973); *Farmington Dowel Products Co. v. Forster Manufacturing Co.*, 297 F. Supp. 924 (D. Me. 1969), *modified*, 421 F. 2d 61 (1st Cir. 1970), ABA Civil Jury Instructions, p. 148; Devitt & Blackmar, *Federal Jury Practice and Instructions*, § 10.11; Preliminary Instructions, Tr. 144.

[73] REQUEST 57

I instructed you both in my preliminary instructions and on numerous occasions during the trial that the only evidence you may consider is that which is introduced in Court from the witness stand and in the form of documents. The actions of counsel in this case are not evidence and cannot be considered by you in any way in determining the issue of guilt or innocence. You are not to consider facial gestures, indications of belief or disbelief, tone of voice, or other individual conduct of counsel. Neither are you to consider the questions asked by counsel; you may consider only the answers to those questions. It is essential that in deciding this important matter you not be influenced or distracted by the conduct of lawyers.

[74] REQUEST 58

Bear in mind, as you are to decide the case only on legitimate evidence, that questions asked by the lawyers, as well as other statements by counsel or the Judge, are not evidence. So a question, however dramatic or exciting it may sound by itself, has no significance to you without an answer. If an objection is made to a question and sustained, then you have received no evidence whatever as a result of that question and must dismiss it from your minds.

Similarly, if after a question was asked and an answer given, the answer was ordered stricken from the record, disregard the answer as well as the question. Counsel have relied upon you to follow my instructions with regard to answers which have been stricken. If they were not able to rely upon you in this respect, they might well have asked additional questions or put in additional evidence; so you must follow my directions.

Nor are you to draw any conclusions from the fact that the Court asked certain questions. This was solely to elicit facts.

United States v. Interborough Delicatessen Dealers Ass'n., Inc., 62 Cir. 515 (S.D.N.Y. 1966), 10080–10081; *City of Burlington v. Westinghouse Electric Corp.*, 246 F. Supp. 839 (D.D.C. 1965), *rev'd*, 351 F. 2d 762 (D.C. Cir. 1965), ABA Civil Jury Instructions, p. 149; *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F. Supp. 440 (E.D. Pa. 1960), *aff'd*, 297 F. 2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962), ABA Civil Jury Instructions, p. 144.

[75] XIX. Evidence Admitted for a Limited Purpose

REQUEST 59

In certain instances evidence was admitted for a particular purpose, and not generally. When this was done, I instructed you at the time that the evidence was admitted for a limited purpose only and informed you what that purpose was. I instruct you again that you may not consider any of this evidence for any purpose other than the purpose for which it was admitted.

Adapted from Devitt & Blackmar, *Federal Jury Practice and Instructions*, § 10.05 and Notes thereto.

[76] REQUEST 60

The evidence you have heard concerning the file retention policy and practice of Celotex was admitted solely and only for the purpose of explaining why certain documents were not available, if they were not available (Tr. 10,038).

The evidence shows that Celotex had a regular policy of retaining certain kinds of documents for a specified period of time, and other kinds of documents only for as long as they might be needed in the Celotex Business. This policy was established on advice of the legal department [GX 2124A, Thompson, Tr. 11,673–76, 11,686–688]. The evidence shows that Celotex disposed of certain documents pursuant to its regular procedure under this policy [GX 2124A]. The evidence further shows that Celotex retained certain documents relating to the pricing of gypsum products as far back as 1965 [Goddard, Tr. 6801–02, 11,791–92, 11,868–70]. There is no evidence that Celotex disposed of any documents pursuant to any alleged price-fixing conspiracy. I instruct you not to reach any conclusion which is unfavorable to Celotex, or to any other defendant, based on the evidence that Celotex disposed of certain documents.

(See Court's ruling on Motion of the Celotex Corporation for an Order specifying Jury Instruction to be given on document retention by Celotex, Tr. 10,718–19). Subsequent to the Court's ruling, further testimony on this issue was given, specifying that it was the Legal Department of Celotex which gave advice on document retention, and that the 350 and 360 files and related papers extend back to 1965. Record citations to such testimony are as shown above.

[77] XX. GEORGIA-PACIFIC

REQUEST 61

A matter should be brought to your attention in your deliberations regarding Georgia-Pacific Corporation.

The evidence is clear and undisputed that Georgia-Pacific did not enter the gypsum industry until April 28, 1965 when Georgia-Pacific acquired the Bestwall Gypsum Company.

In your consideration of the evidence, should you find that Bestwall Gypsum Company engaged in any of the illegal conduct charged, you may not consider this conduct as affecting or binding Georgia-Pacific.

I instruct you that under the law, a corporation which succeeds or takes the place of another corporation in an industry is not presumed to carry on any illegal activity in which the predecessor corporation may have engaged.

Thus, Georgia-Pacific is entitled to be judged by you only with respect to the acts which it undertook after it came into the gypsum industry in April, 1965. The Government must prove beyond a reasonable doubt that subsequent to April, 1965, Georgia-Pacific consciously committed itself to join the alleged [78] conspiracy and that it performed acts in furtherance of that conspiracy within the period of the Statute of Limitations.

United States v. Johns-Manville Corporation, 245 F. Supp. 74 (E.D. Pa. 1965).

[79] REQUEST 62

You have heard evidence concerning the operation by Georgia-Pacific of its more than one-hundred branches. That evidence shows that at all times relevant to this case, including specifically during the period of the Statute of Limitations, December 27, 1968 to December 27, 1973, Georgia-Pacific branch managers had independent authority over pricing and exercised that authority without the approval or consultation of their superiors.

You have heard much evidence that Georgia-Pacific's entry into the gypsum industry in May, 1965, and the subsequent integration of the gypsum business into Georgia-Pacific's distribution system, created a wholly new competitive condition in the industry which resulted in vigorous competition in the marketplace.

If you believe this evidence, and if you find that each of the corporate defendants established their prices, terms and conditions of sale independently, this conclusion would, of course, raise a reasonable doubt and you must acquit these defendants.

[80] XXI. GRAND JURY TESTIMONY

REQUEST 63

During the course of this trial counsel for the Government have, on occasion, read portions of the Grand Jury Transcript

to witnesses for the purpose of refreshing their recollection and impeaching their credibility. On some occasion the witnesses' recollection was refreshed, and on other occasions it was not. The material read from the transcript does not constitute evidence but is simply matter used to refresh a witnesses' recollection or to impeach his credibility. Therefore, except in the one instance in which the grand jury testimony of Melvin Quayle, who is deceased, was read in connection with certain aspects of Mr. Huckleberry's testimony, you may not consider the Grand Jury Testimony as evidence of any fact in this proceeding.

United States v. Continental Baking Co., 281 F. 2d 137 (6th Cir. 1960), ABA Criminal Jury Instructions, p. 386; *United States v. Budzanoski*, 331 F. Supp. 1201, 1205 (W.D. Pa. 1971) (Teitelbaum, J.), *aff'd* 462 F. 2d 443 (3d Cir.); *cert. denied*, 409 U.S. 949 (1972); *United States v. Proctor & Gamble Co.*, 180 F. Supp. 195, 202 (D.N.J. 1959).

[81] XXII. Credibility of Witnesses

REQUEST 64

Now, I have said to you that you are the judges of the facts. As such, you are also judges of the credibility of the witnesses. You determine how much credit you shall give to any witness who testified. Although you cannot arbitrarily refuse to credit any witness, how much credit, how much credence, you shall place on a witness' testimony lies wholly within your own judgment. That power is to be exercised reasonably, not arbitrarily.

You have a right to, and you should, take into consideration the witness' manner upon the witness stand; whether he seemed candid or evasive; whether he seemed sincere in his ability or inability to recollect past events; the character of his testimony, as being probable or improbable; whether his story fitted in consistently with the rest of the credible testimony in the case; whether he is or is not disputed by other credible testimony; whether he has been backed up by other credible testimony, and all other circumstances surrounding his testimony.

The officers and employees of the defendants are also to be tested in their credibility by the same rules that apply to other witnesses. You have a right to consider the fact that they are interested in the case, but you must also remember that [82] they took oaths under penalty of perjury to tell the truth, and

you cannot refuse to credit them simply because they are employed by the defendants. You must test them by the same rules that you use to test the credibility of other witnesses.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see it or hear it differently. An innocent misrecollection like failure of recollection is not an uncommon experience, particularly when, as here, the testimony is given many years after the events in question took place.

After making your own judgment, you will give the testimony of each witness such credibility as you may think it deserves.

Young Ah Chor v. Dulles, 270 F. 2d 338, 341 (9th Cir. 1959); *Hardware Mutual Ins. Co. v. Jacob Hieb, Inc.*, 146 F. 2d 447, 451 (8th Cir. 1945); *Emanuel v. Kansas City Title & Trust Co.*, 127 F. 2d 175, 179 (8th Cir. 1942); *Weaver v. United States*, 111 F. 2d 603, 607 (8th Cir. 1940); *Fraser v. Williams*, 61 F. Supp. 763, 766 (E.D. Wis. 1945); *cf. United States v. General Motors Corp.* (N.D. Ind. 1938), *aff'd* 121 F. 2d 376 (7th Cir. 1941), *cert. denied*, 314 U.S. 618 (1941), ABA Criminal Jury Instructions, pp. 116–17. *United States v. General Motors*, Crim. 47140 (E.D. Mich. 1973).

[83] REQUEST 65

Every witness who has appeared in this case had the legal right to the assistance of counsel before and during the time he testified at this trial. Every witness has this legal right, and also has the right to discuss his testimony with his attorneys or with the attorneys for the company for which he is employed. You have heard testimony from some of the witnesses at this trial that they did in fact have consultations with their attorneys either before or during trial, or both. I therefore charge you that you should draw no inference from the fact that any witness had such consultations with his attorney prior to or during his testimony at this trial.

[84] XXIII. Conflicting Evidence

REQUEST 66

You have seen the witnesses and have heard them testify. So, it is your duty, as jurors, to reconcile all the testimony of

all the witnesses, both on direct and on cross-examination, with all of the facts, if you are able to. If, after weighing the matter carefully, and viewing it in the light of your best judgment as reasonable men and women, you find that you are unable to reconcile a conflict in the testimony upon any reasonable theory consistent with an intention on the part of each of the witnesses to testify truthfully, then it is for you to say whom you will believe. However, conflicting testimony in and of itself may be sufficient to raise a reasonable doubt. If you have such a doubt as a result of a conflict in testimony, it is your duty to acquit the defendants.

Hardware Mutual Ins. Co. v. Jacob Hieb, Inc., 146 F. 2d 447, 451 (8th Cir. 1945); *Dillon v. Evansville Refining Co., Inc.*, 127 F. 2d 13, 17 (7th Cir. 1942); *United States v. Interborough Delicatessen Dealers Ass'n., Inc.*, 62 Cr. 515 (S.D.N.Y. 1966), Tr. 10079–10080.

[85] XXIV. Presumption of Innocence

REQUEST 67

Each of the defendants in this case is presumed to be completely innocent; they do not have to prove their innocence. This is a fundamental principle under our law and one of the most important safeguards of our individual freedom.

The burden of proof rests entirely upon the Government to prove to your satisfaction, beyond a reasonable doubt, the essential elements and ingredients of the offense charged. This burden never shifts but remains upon the Government throughout the case and if, after consideration of all the evidence in this case, including the facts elicited by defendants on cross examination and their own defense, you should entertain a reasonable doubt as to the guilt of any defendant on trial, that defendant is entitled to be acquitted. The presumption of innocence alone is sufficient to acquit a defendant unless you, the jurors, are satisfied beyond a reasonable doubt of that defendant's guilt as charged after careful and impartial consideration of all the evidence in this case.

Therefore, I instruct you and remind you that the defendants do not have to prove their innocence in this case. They do not [86] have to prove anything. The burden rests upon the Government to prove them guilty, and to prove them guilty beyond a reasonable doubt.

Adapted from *United States v. American Tobacco Co., supra*, ABA Criminal Jury Instructions, p. 163. See also Devitt & Blackmar, *Federal Jury Practice and Instructions*, § 11.01, pp. 205–06; Preliminary Instructions, Tr. 134–35; *United States v. Stubin*, 446 F. 2d 457, 465 n. 7 (3d Cir. 1971); *United States v. Foster*, 9 F.R.D. 367, 377 (S.D.N.Y. 1949).

[87] XXV. Reasonable Doubt

REQUEST 68

In order to overcome the presumption of innocence, the Government must satisfy you that defendants are guilty as charged beyond a reasonable doubt.

The kind of doubt I am referring to is a doubt based upon reason and common sense arising from the state of the evidence—a doubt which would make you hesitate to act, and I emphasize the word hesitate, in the serious and important affairs of your own lives. That is, you are not to gamble in the slightest way with the fate of these defendants. There is too much at stake. Even if you find that guilt is more probable than innocence, you still must acquit the defendants if you have a reasonable doubt as to their guilt. To convict, you must have an abiding conviction to a moral certainty, based on the evidence, of the truth of the prosecution's charges in the Indictment, and if you do not find to a moral certainty that the prosecution has proved the charges contained in the Indictment as to any defendant, you must acquit that defendant.

Adapted from *United States v. Stubin, supra*, 465 n. 7; *Malagon-Ramirez v. United States*, 404 F. 2d 604, 605 (9th Cir. 1968, *cert. dismissed*, 396 U.S. 801 (1969). *In re Winship*, 397 U.S. 358, 367–68 (1970); *Holland v. United States*, 348 U.S. 121, 140 (1954); Preliminary Instructions, 135.

[88] REQUEST 69

A defendant must never be convicted upon mere suspicion, guesswork or conjecture.

If, after a fair and impartial consideration of all the evidence, you are not satisfied of the guilt of a defendant, or you do not feel convinced to a moral certainty that a defendant is guilty

of the charge, then you have a reasonable doubt, as I have just defined that phrase, and it is your duty to acquit that defendant. So also, if after you have heard all the evidence and you have heard all the law in the case you view it as permitting either of two conclusions, one of innocence, the other of guilt, then, of course, you must adopt the conclusion of innocence and you must acquit the defendants. Further, if you are confused about the evidence and what inferences to draw or not draw, then you must have reasonable doubt and must acquit the defendants.

Malagon-Ramirez v. United States, supra, 605; *United States v. Interstate Engineering Corp.*, 288 F. Supp. 40, 409 (D.N.H. 1967); *United States v. Delay*, 440 F. 2d 566, 568 (7th 1971); *United States v. Ortiz*, 445 F. 2d 1100, 110 (10th Cir. 1971); *United States v. Stubin, supra*, 465 n. 7; Devitt & Blackmar, *Federal Jury Practice and Instructions*, § 11.01; Preliminary Instructions, 135–36.

XXVI. Verdict of Jury

REQUEST 70

You have heard the evidence and you have heard me state the law that you are to apply to the evidence. In deciding this case, each of you is entitled to his own opinion, but you are also required to exchange views with your fellow jurors. That, obviously, is the very purpose of jury deliberation—to discuss and consider the evidence and to listen to the arguments and reasons of your fellow jurors; to present your own individual point of view and reach an agreement, if you can, solely and only on the evidence and without violence to your own individual judgment and conscience. Thus, if you should find yourselves in disagreement as to the guilt or innocence of a defendant, you are instructed to re-examine your opinions in the light of the contrary opinion of your fellow jurors.

Nevertheless, you should not join in a majority view of which you remain conscientiously unconvinced, merely because you find yourselves in the minority. You are not to yield simply because you find yourself outnumbered or outweighed. In a criminal prosecution it is especially important that each juror be conscientiously convinced of guilt beyond a reasonable doubt if that is to be the verdict. No juror may join in a verdict merely because he finds himself in a minority. He must [90] be open to logical persuasion, but on each juror's shoulders is the whole responsibility and thus in the end each juror must decide for himself.

In order for a verdict of either guilty or not guilty to be found by you, it must be the unanimous verdict of all twelve jurors. Since guilt must be established beyond a reasonable doubt, all of you must be convinced beyond that doubt. A verdict of guilty cannot be returned if even one of you has a reasonable doubt.

Before you begin your deliberations you shall select a foreman.

Rhodes v. United States, 282 F. 2d 59, 62–63 (4th Cir. 1960), *cert. denied*, 364 U.S. 912 (1960).

Billeci v. United States, 184 F. 2d 394, 403 (D.C. Cir. 1950); *United States v. Schneiderman*, 106 F. Supp. 906, 940 (S.D. Cal. 1952), *aff'd sub nom. Yates v. United States*, 225 F. 2d 146 (9th Cir. 1955), *convictions rev'd*, 354 U.S. 298 (1957).

[91] Dated: June 19, 1975

Respectfully submitted,

(signatures omitted)

GOVERNMENT'S REQUEST TO CHARGE

• • • • •

c. The next group of means and methods asserts, in substance, that defendants and alleged co-conspirators exchanged price and other competitive information with each other, and that the information was given and received in order to maintain or stabilize prices in the gypsum industry.

The law prohibits agreements among competitors to exchange price and other competitive information where the purpose of the exchange is to maintain or stabilize prices. This prohibition applies whether or not such an agreement is successful in achieving its goal. The law also provides that the existence of an agreement to exchange such information may be shown by proof that the competitors engaged in a practice of providing each other the information with the expectation that they would receive the same information when they requested it. This is but another way of stating my previous instructions that a mutual understanding or agreement among competitors may be shown by proof of their course of conduct.

Defendants do not dispute the fact that they did exchange price and other competitive information among themselves and with others. However, they deny the existence of any agreement to do so. And they maintain that the exchange of competitive information which did take place, which they term "verification," cannot be considered as any evidence of the conspiracy alleged in the indictment. Defendants contend that the purpose of the exchanges between the alleged conspirator corporations was not to fix or stabilize prices in violation of the Sherman Act. Rather, they claim that the purpose for the exchanges was solely to ensure their compliance with another antitrust law known as the Robinson-Patman Act.

In order for you to be able to assess the opposing contentions of the parties and the evidence you have heard on this aspect of the case, I am going to read parts of the Robinson-Patman Act for you. I will then explain what these provisions of the law mean for the purposes of this case, and how you are to weigh and consider the evidence relating to this topic.

So far as it concerns us here, the Robinson-Patman Act provides that it is unlawful for a seller of a commodity "to discriminate in price between different purchasers" of that commodity "where the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy, or prevent competition with" customers of the seller who grants the discrinmation in price.

What this means is that where a seller has two customers which compete in the same market—for example, two lumber yards in the same vicinity—the seller may not sell to one of them at a lower price than it sells to the other, where the effect of the discrimination tends to injure the unfavored customer in his efforts to compete with the favored customer, unless the lower price can be justified under one of the other provisions in the Act.

The Robinson-Patman Act does provide certain justifications or defenses which are available to a seller who chooses to discriminate in price between two of his competing customers. Among these is what is commonly termed the "good faith" meeting competition defense. If a seller does choose to discriminate in price between two of his competing customers, and is then charged with violating the Robinson-Patman Act, the Act provides that he may defend against that charge, and I quote, "by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price to a competitor, or the services or facilities furnished by a competitor."

What this means is that a seller's lower price to one of his customers in a market is not a violation of the Robinson-PatmanAct, if the seller can show that he charged that lower price because he believed in good faith that one of his competitors had charged or offered that lower price to that particular customer.

The Robinson-Patman Act does not require that every manufacturer must sell at exactly the same price to a particular cus-

tomer. For example, where a manufacturer sells to only one customer in a market, he may charge that customer any price he wishes without regard to the price offered that customer by a competing manufacturer. In addition, where a manufacturer does have more than one customer who compete with each other, he may lower his price equally to them and thus avoid any charge of price discrimination under the Robinson-Patman Act, no matter what his competitors' prices may be.

You will notice that the Act does not specify any method a seller must use to establish his "good faith" in charging a lower price to a customer in order to meet a competitor's price. What the law does require of such a seller is that he have facts available to him at the time which would lead a reasonable and prudent person to believe that the lower competitive price existed. In other words, in order to establish that his lower price was granted in "good faith" to meet a competitor's lower price, a seller need not prove that his competitor in fact had granted or offered the exact same lower price; all he would have to show is that he had a reasonable or good faith belief that such a lower price existed.

The defendants contend that they exchanged such information, or "verified," solely for the purpose of ensuring that if they made a sale at a lower price to a particular customer to meet the reported lower price or offer of a competitor, they would be able to establish, if the question were ever raised, their "good faith" in lowering their price to that customer.

The government contends that defendants and others engaged in this practice pursuant to an agreement and mutual understanding. The government asserts that defendants' purpose was not solely to establish their "good faith" under the Robinson-Patman Act but that they exchanged competitive information for the purpose of maintaining or stabilizing prices.

It will be up to you, the jury, to resolve these issues. First, you must determine whether there was an agreement among the parties to engage in the practice of "price checking" or "verification." In deciding this issue you will apply my previous instructions concerning what the government must prove to establish the existence of a mutual understanding or agreement between or among competitors.

Second, you must determine the purpose for the exchange of competitive information between the defendants and alleged

co-conspirator corporations. If you determine that these exchanges were engaged in solely for the purpose of establishing the competitor companies' "good faith" meeting competition defense under the Robinson-Patman Act when they wished to sell wallboard at a lower price or on more favorable credit terms to a particular customer, then you may not consider the exchanges standing alone as any evidence of the agreement to maintain or stabilize prices as charged in the indictment.

However, if you find that the purpose of these exchanges was for reasons other than to ensure compliance with the Robinson-Patman Act, then you may consider these exchanges as evidence of the mutual agreement or understanding alleged in the indictment to maintain or stabilize prices.

In making your determination as to the purpose for these exchanges, you should take into account the means available to the defendant and alleged co-conspirator corporations for gathering and evaluating reports of competitors' lower prices without contacting each other. Consider the size, experience and organization of their marketing and pricing staffs and their ability to form reasonable judgments about reported competitive situations on the basis of information each company was able to gather in the field. Such information could be developed by asking the customer for details concerning the identity of the competitor, the price offered, the date and duration of the offer and asking to see an invoice or written quotation. Or the company could ask the customer to sign a written statement that the customer had received a lower offer from a competitor. Ask yourself whether these companies would be able to make a reasonable and prudent judgment about a competitor's reported lower price by comparing that report against other information available to the company, such as the conditions in the particular market, its own prices to other customers in that market, and other records the company kept reflecting reports of its competitors' lower prices or offers.

You should also give careful scrutiny to all the circumstances surrounding these exchanges of price and their competitive information in determining the purpose for them.

Consider the extent to which the people who were involved in these exchanges, either over the telephone or at face-to-face meetings, kept and maintained records of their contacts or con-

versations. You should ask yourself if it would be prudent or advisable for a person engaging in these exchanges to make and keep such records if the purpose of the contact was solely to establish that his company was acting "in good faith" to meet the equally low price or offer of his competitor. Or would the making of such written records appear to be too burdensome or too costly, or too time consuming? Would there be any other reason consistent with the company's desire to establish its "good faith" under the Robinson-Patman Act for the company not to make a systematic record of its "pricing checking" or "verification" contacts?

You should also determine whether the evidence shows that any of the defendants or alleged co-conspirators issued specific directions to destroy or not to keep records of these exchanges. Directions of this nature would indicate that the parties were attempting to conceal their actions, and would be evidence that the purpose of the exchanges went beyond any attempt to comply with the Robinson-Patman Act.

Consider also the content of the exchanges of information among these competitors as shown by the testimony you have heard and the documents you have seen which were written at the time of the events. You should ask yourself whether these exchanges were limited simply to a question by the person making the call whether or not his competitor had made a sale or an offer to sell board to a particular customer at a particular price. Were the responses limited to telling the caller whether or not the price he asked about had been granted or offered to the particular customer in question? Or does the evidence you have seen and heard indicate discussions about more than a particular price to a particular customer; for example, questions and answers relating to prices in areas rather than to a specific customer? Did the caller request more than a "yes-no" answer to questions he asked about a competitor's allegedly lower price? Did the person called answer such broader questions or volunteer competitive information beyond responding "yes" or "no"? Did the person called offer reasons for the grant or offer of a lower price to a customer? If you find that explanations were asked for or volunteered, that would be an indication that the persons engaged in such an exchange were asking for and receiving assurances that similar lower prices would not be granted to other customers. Exchanges of

this nature, if you find they occurred, would reflect a purpose to achieve uniformity or to maintain or stabilize prices as charged in the indictment, rather than a purpose to comply with the Robinson-Patman Act.

Weigh the testimony you have heard from the people who were involved in this practice of "price checking" or "verification." What did they testify their purpose was in exchanging price information with their competitors? Does their testimony reveal a purpose solely to establish whether in fact a lower price or offer existed so that a sale at a lower price by the caller could be defended under the "good faith" provision of the Robinson-Patman Act? Or does that testimony reflect a purpose to maintain or stabilize prices by these companies by assuring each other that they could learn whether and to what extent each of them was deviating from published prices or terms and conditions of sale?

Consider also the circumstances surrounding the exchanges. Did the exchanges appear to occur only in situations where the caller wanted to make a sale at a lower price and was unsure whether he would be meeting a similar price granted or offered by one of his competitors? Or does the evidence indicate that calls were made in situations where the caller and his company had no intention of making a sale at the reported lower price, even if it was confirmed by the competitor. Exchanges of price information in such situations, if you find they were made, would not be for the purpose of complying with the Robinson-Patman Act, but would tend to reflect the existence of the agreement to maintain or stabilize prices as charged in the indictment.

Of course, there may be other evidence which you might find significant in determining whether these exchanges of competitive information were engaged in solely for the purpose of complying with the Robinson-Patman Act. For example, you may consider such factors as to why the person responding to the call did so, and whether he knew why the caller wanted the information and what decisions, if any, would be based upon it. In this connection, you may consider the motives of the person responding to the call. If he had a sales advantage in terms of a lower price to a customer, why would he be willing to reveal that advantage to his competitor?

The fact that I have not mentioned categories of evidence which you believe bear on this question does not mean that you are not to consider them. Similarly, the fact that I have mentioned certain kinds or categories of evidence does not mean that you must consider that evidence and only that evidence as controlling on this issue. The purpose of the exchanges of price information is a question for you to determine. I have merely indicated some of the kinds of questions you should be asking yourself on this topic, and the categories of evidence you may deem relevant in making your determination.

I want to make clear that the Robinson-Patman Act has nothing whatever to do with the exchange of information or discussions between or among competitors about their future plans or intentions on prices or terms and conditions of sale. These kinds of exchanges or discussions regarding proposed or possible future action, if you find they occurred, would be evidence tending to indicate the existence of the mutual understanding or agreement alleged in the indictment to maintain and stabilize prices.

A short while ago I stated that if you find that the purpose of an agreement to exchange price information was to maintain or stabilize prices, then it did not matter whether or not the agreement was successful. However, if it was successful in whole or in part, in that the effect of the exchanges was to maintain or stabilize prices, then an agreement to engage in such exchanges is a violation of the Sherman Act regardless of the specific purpose that the parties to the agreement had in their minds. This is because Section 1 of the Sherman Act is what is known as a general intent crime. This means that proof of a specific purpose to restrain trade is not required to establish the offense. The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to maintain or stabilize prices, then the parties to them are presumed as a matter of law to have intended that result.

AUTHORITY

United States v. Container Corp., 393 U. S. 333 (1969);
Federal Trade Commission v. A. E. Staley Mfg. Co., 324 U. S. 746 (1945);

United States v. Patten, 226 U. S. 525, 543 (1913);
Esco Corp. v. United States, 340 F. 2d 1000 (9th Cir. 1965);
Beatrice Foods Co., 76 F. T. C. 719, 812 (1969), *affirmed sub nom., Kroger Co. v. Federal Trade Commission*, 438 F. 2d 1373 (6th Cir.), *cert denied*, 404 U. S. 871 (1971);
Charge to the jury in *United States* v. *The Sherwin-Williams Co.*, (Gourley, Ch. J.), Cr. 12789 (W.D. Pa. 1948), printed in ABA, *Jury Instructions in Criminal Antitrust Cases* (1965), pp. 284–85.

GEORGIA-PACIFIC CORPORATION'S REQUEST FOR ADDITIONAL FINAL JURY INSTRUCTIONS

GEORGIA-PACIFIC

REQUEST 1

The evidence is clear, and indeed it is stipulated for this proceeding, that Georgia-Pacific did not enter the gypsum business until April 28, 1965 when Georgia-Pacific acquired Bestwall Gypsum Company. There is evidence that Georgia-Pacific entered the gypsum business with the intent of increasing its share of the gypsum business as compared to the share of the business previously enjoyed by Bestwall Gypsum Company and that Georgia-Pacific had the intent at the time of entry into the gypsum business of making the competitors in the gypsum business move over so that Georgia-Pacific could increase its share of the business. There also is evidence that Georgia-Pacific applied to the gypsum business certain policies and practices of Georgia-Pacific developed by Georgia-Pacific in other businesses. There is evidence that, among those policies and practices of Georgia-Pacific, were the policy of flat-out production, the practice of distributing its building supply products through a network of branches operated as profit centers and located throughout the United States, and the operation of these branches through branch managers who had independent pricing authority over the various products sold by the branch.

Now ladies and gentlemen of the jury, the application of these policies and practices developed in another industry by Georgia-Pacific to the gypsum business is inconsistent with the assertion by the prosecution that Georgia-Pacific consciously committed itself to the conspiracy charged, if any existed. Thus, you should carefully consider each of these matters relating to Georgia-Pacific's policies and practices in determining whether Georgia-Pacific in 1965 or thereafter consciously committed itself to the alleged conspiracy, if any, and whether Georgia-Pacific was a knowing party to any such alleged conspiracy

during the statutory period. The existence and application of these policies and practices by Georgia-Pacific to the gypsum business in themselves can raise a reasonable doubt as to whether Georgia-Pacific was a participant in the conspiracy charged, if any existed. If you find that these matters raise a reasonable doubt in that regard, you of course must acquit Georgia-Pacific.

GEORGIA-PACIFIC

REQUEST 2

These matters which I have discussed relating to Georgia-Pacific's policies and practices developed in other businesses and applied to the gypsum business are also significant as to whether guilt has been proved beyond a reasonable doubt as to the other defendants. There is evidence that the other corporate defendants competed with Georgia-Pacific after Georgia-Pacific entered business and that the other defendants took actions and initiatives to compete effectively with the competitive forces posed by the Georgia-Pacific competition, policies and practices. That competitive initiative and reaction by the other corporate defendants is inconsistent with the charge by the Government that all the corporate defendants were consciously committed to the conspiracy charged. Thus, these Georgia-Pacific policies and practices and the reactions of the other corporate defendants to them are significant factors to evaluate in determining whether guilt against the other defendants has been proved beyond a reasonable doubt. These matters therefore may raise a reasonable doubt as to the guilt of each of the defendants, and if these matters raise such a reasonable doubt, you of course must acquit all of the defendants.

GEORGIA-PACIFIC

REQUEST 3

I want to discuss further one aspect of Georgia-Pacific's policies and practices with respect to the distribution of gypsum products and the pricing of those products. The evidence is that Georgia-Pacific distributed gypsum products through a network of branches located throughout the United States, and that during the statutory period, such branch operation was the

method employed by Georgia-Pacific to distribute gypsum products. There is evidence that at all times relevant to this case, including specifically during the period of the statute of limitations, December 27, 1968 to December 27, 1973, Georgia-Pacific's branch managers had independent authority over pricing of gypsum products and exercised that authority without the approval of, or consultation with, their superiors. The evidence is that the branch operation of Georgia-Pacific resulted in vigorous competition by Georgia-Pacific, including price competition and price cutting by Georgia-Pacific. Thus, if you believe this evidence with regard to Georgia-Pacific's branch operation and independent pricing authority of branch managers, you must acquit Georgia-Pacific.

GEORGIA-PACIFIC

REQUEST 4

The evidence regarding Georgia-Pacific's branch operation and pricing authority is also significant with respect to the other defendants in this case. There is evidence that the other corporate defendants took actions and initiatives to meet and compete with the competition of Georgia-Pacific in the marketplace. If you believe the evidence regarding the branch operations of Georgia-Pacific and the independent pricing authority of the Georgia-Pacific branch managers, and if you believe that the other corporate defendants independently competed with and attempted to meet and respond to that competition posed by Georgia-Pacific, then you must acquit all of the defendants in this case.

DATED: June 24, 1975

SUPPLEMENTAL FINAL INSTRUCTION REQUESTED BY DEFENDANT WATT REGARDING VERIFICATION AND THE ROBINSON-PATMAN ACT

There has been evidence that at varying periods of time each defendant corporation contacted various of its competitors, including other defendants, to seek information as to its competitors' current prices or terms and conditions of sale. I instruct you that each defendant was required by Section 2 of the Robinson-Patman Act not to lower its prices or terms and conditions of sale to its customers under certain competitive conditions unless the defendant knew or had reason to believe that a competing customer's supplier had reduced its price or terms and conditions of sale to the competing customer. Thus, each defendant could reasonably conclude that the antitrust laws did require it to know or have reason to believe that a competing supplier had reduced its price or offered more favorable terms and conditions to the defendant's customers competing with the customers of the other suppliers.

If you find that defendant sought price or other information from competitors pursuant to its reasonable belief of the obligations of the Robinson-Patman law and not to fix prices, then you should find that no violation of the law took place.

Respectfully submitted,

(signatures omitted)

DATED: JUNE 26, 1975.

Authority:

Defendants' Joint Memorandum regarding verification dated May 5, 1975. *Federal Trade Commission v. A. E. Staley Company*, 324 U.S. 746, 750–60 (1945); *Viviano Macaroni Company v. Federal Trade Commission*, 411 F. 2d 255, 258, 259 (3d Cir. 1969); *Wall Products Company v. National Gypsum Company*, 326 F. Supp. 295 (N.D. Cal. 1971); *Gray v. Shell Oil*, 469 F. 2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); *Belliston v. Texaco, Inc.*, 455 F. 2d 175 (10th Cir. 1972), *cert. denied*, U.S. 928 (1972), *reh'g denied* 409 U.S. 1001 (1972); and *Webster v. Sinclair Refining Company*, 338 F. Supp. 248 (S.D. Ala. 1971).

SUPPLEMENTAL FINAL INSTRUCTION REQUESTED BY DEFENDANT WATT REGARDING RETROACTIVITY OF INTERVENING CHANGE OF LAW AFFECTING VERIFICATION

There has been some evidence in this case regarding a decision of the United States Supreme Court in a case styled *United States v. Container Corporation* in January 1969, sometimes referred to as the *Container* case, and certain actions taken by one or more defendants shortly following that decision. If you find that any defendant stopped the practice of verification prior to January 1969 or promptly thereafter upon being advised of that decision by counsel, you must not consider or give weight to such defendant's participation in the practice of verification in determining that defendant's guilt or innocence.

Respectfully submitted,

(signatures omitted)

DATED: JUNE 26, 1975.

DEFENDANT CELOTEX SUPPLEMENTAL REQUEST FOR FINAL JURY INSTRUCTIONS

Defendant, The Celotex Corporation, hereby submits the following supplemental request for final jury instructions: [Exchange of price information with the effect of stabilizing prices]

1. If you should find beyond a reasonable doubt that price verification was not for the purpose of compliance with the Robinson-Patman Act, as a matter of law you still cannot find a conspiracy to fix or stabilize prices merely because you find an exchange of price information among defendants. In order to find an unlawful conspiracy based on the exchange of price information, you must further find that the exchange of price information was pursuant to an agreement, and also that the exchange of price information had the effect of fixing or stabilizing the prices at which gypsum board was sold.

Unless you find that all of those conditions exist beyond a reasonable doubt, you may not find a conspiracy based on the exchange of price information.

[Sherman Act does not prescribe selling prices, markets or customers]

2. You are instructed that the Sherman Act does not prescribe the price at which gypsum board must be sold nor does it prescribe the price at which any other product must be sold; neither does the Sherman Act prescribe in what market or to what customers any company should sell its gypsum board. Under the Sherman Act any person or company may offer its products to any price at which it desires to sell, and may sell such products to any customers to which it desires to sell, so long as such prices or customers are not conspiratorially arrived at. Under the Sherman Act, each defendant therefore had the right to offer its products for sale to any customer at such price and in such quantities as it desired and, likewise, had the right to

offer its products for sale in other markets at whatever price and quantity it desired, so long as it did not agree with any competitor to do so.

Respectfully submitted,

(signatures omitted)

DATED: June 27, 1975.

DEFENDANTS' OBJECTION TO MANNER OF COURT'S RULINGS ON REQUESTED FINAL JURY INSTRUCTIONS AND MOTION FOR CLARIFICATION OF COURT'S RULINGS

1. Defendants respectfully submit that the Court's rulings, as delivered on June 27, 1975, on requests for final jury instructions did not comply with Rule 30 of the Federal Rules of Criminal Procedures. Accordingly, pursuant to the Court's direction, defendants hereby object to the manner of the rulings and move the Court for clarification of those rulings or, in the alternative, a written copy of the Court's charge prior to the arguments of counsel.

2. Rule 30 requires the Court to "inform counsel of its proposed action upon the requests [for jury instructions] prior to their arguments to the jury . . . ." The purpose of this mandatory rule is to "inform the trial lawyers in a fair way what the charge is going to be, so that they may intelligently argue the case to the jury." *Ross v. United States*, 180 F.2d 160, 165–166 (6th Cir. 1950), *cert. denied*, 344 *U.S.* 832 (1952); *see also*, *United States v. Mendoza*, 473 F. 2d 697, 701 (5th Cir. 1973). The Court's "rulings" do not meet this standard of informativeness.*

3. The Court disposed of many of the parties' requested instructions by stating that they would be "denied as stated", (Tr. 13,757–59); given "in substance" (Tr. 13,756–59); and even that some would be "denied to the extent that I do not give it in substance" (Tr. 13,758–59). The requested instructions were extensive, and the Court's cryptic disposition of them gave counsel a little guidance on the substance of the charge. As stated by Professor Moore, a ruling which uses formulations such as " 'deni[ed] except as charged' covers a mul-

* Further written objections and supplemental requests may be filed by Wednesday, July 2, 1975.

titude of possibilities and is grossly uninformative." 8 *Moore's Federal Practice*, ¶ 30.03[2] at p. 30–7 (2d ed. 1975).

4. While the Court went on to outline "in essence" its charge, this description was also insufficient to apprise the attorneys on specific aspects of the charge. Two examples are the Court's statements that "I am going to discuss joinder of a conspiracy and what has to be proved to show that any particular Defendant did join such a conspiracy . . ." (Tr. 13,773) and that "I am going to attempt to define price fixing conspiracy, the elements of it, pointing out, of course, that motive is immaterial . . ." (Tr. 13,773). Although stating that the charge would include the elements of each of these issues, the Court gave no indication of what it thought those elements to be.

5. Accordingly, defendants move for clarification of the Court's rulings on all the requested instructions in conformity with Rule 30 or, in the alternative, an advance written copy of the Court's charge. See 8 *Moore's Federal Practice, supra* ¶ 30.03[2] at pp. 30–8 and 30–9.

Respectfully submitted,

(signatures omitted)

JUNE 27, 1975

GEORGIA-PACIFIC CORPORATION'S REQUEST FOR SUPPLEMENTARY FINAL JURY INSTRUCTIONS

GEORGIA-PACIFIC

SUPPLEMENTAL REQUEST A

It is stipulated that Georgia-Pacific did not enter the gypsum business until April 28, 1965 when Georgia-Pacific acquired Bestwall Gypsum Company. There is evidence that Georgia-Pacific entered the gypsum business with the intent of increasing its share of the gypsum business as compared to the share of the business previously enjoyed by Bestwall Gypsum Company and that Georgia-Pacific had the intent at the time of entry into the gypsum business of making the competitors in the gypsum business move over so that Georgia-Pacific could increase its share of the business. There also is evidence that Georgia-Pacific applied to the gypsum business certain policies and practices of Georgia-Pacific developed by Georgia-Pacific in other businesses. There is evidence that, among those policies and practices of Georgia-Pacific, were the policy of flat-out production, the practice of distributing its building supply products through a network of branches operated as profit centers and located throughout the United States, and the operation of these branches through branch managers who had independent pricing authority over the various products sold by the branch.

Now ladies and gentlemen of the jury, Georgia-Pacific contends that, among other things, the application of these policies and practices developed in another industry by Georgia-Pacific to the gypsum business is inconsistent with the assertion by the prosecution that Georgia-Pacific consciously committed itself to the conspiracy charged, if any existed. Thus, you should consider each of these matters relating to Georgia-Pacific's policies and practices in determining whether Georgia-Pacific in 1965 or thereafter consciously committed itself to the alleged conspiracy, if any, and whether Georgia-Pacific was a knowing party to any such alleged conspiracy during the statutory

period. If you find that the matters relating to Georgia-Pacific's policies and practices raise a reasonable doubt as to whether Georgia-Pacific was a participant in the conspiracy charged, if any existed, then you of course must acquit Georgia-Pacific.

If Georgia-Pacific Request 1 is given, it will not be necessary to give Georgia-Pacific Supplemental Request A. By submitting this Supplemental Request A, Georgia-Pacific is not waiving Georgia-Pacific Request 1.

GEORGIA-PACIFIC

SUPPLEMENTAL REQUEST B

I want to discuss further one aspect of Georgia-Pacific's policies and practices with respect to the distribution of gypsum products and the pricing of those products. There is evidence that Georgia-Pacific distributed gypsum products through a network of branches located throughout the United States, and that during the statutory period, such branch operation was the method employed by Georgia-Pacific to distribute gypsum products. There is evidence that at all times relevant to this case, including specifically during the period of the statute of limitations, December 27, 1968 to December 27, 1973, Georgia-Pacific's branch managers had independent authority over pricing of gypsum products and exercised that authority without the approval of, or consultation with, their superiors. There is also evidence that Georgia-Pacific, through its branch operation, engaged in competition, including price competition, and price cutting by Georgia-Pacific. If you believe this evidence with regard to Georgia-Pacific's branch operation and independent pricing authority of its branch manager, you must acquit Georgia-Pacific.

DATED: June 30, 1975

If Georgia-Pacific Request 3 is given, it will not be necessary to give Georgia-Pacific Supplemental Request B. By submitting this Supplemental Request B, Georgia-Pacific is not waiving Georgia-Pacific Request 3.

NATIONAL GYPSUM COMPANY'S REQUEST FOR SUPPLEMENTAL JURY INSTRUCTION

NATIONAL GYPSUM COMPANY REQUEST 1

There has been evidence in this case of a defendant contacting a competitor to verify the existence or nonexistence of a reported lower price or other competitive condition in the market place. This practice has been referred to as "verification." I charge you as a matter of law that such verification contacts of the defendants prior to January 14, 1969 cannot be considered by you in and of themselves as a violation of the antitrust laws. By saying this, I do not mean to imply that such contacts, if any, after January 14, 1969 constitute any evidence of a violation of the antitrust laws.*

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*Memorandum of Defendant, National Gypsum Company, Concerning Retroactivity, filed May 8, 1975.

OBJECTIONS TO GOVERNMENT'S REQUEST TO CHARGE

The undersigned defendants, pursuant to the Court's direction of June 30, 1975, file in writing as of 8:00 A.M. on July 1, 1975, their objections to the twenty-two requests to charge submitted by the Government. Defendants file their objection in this form, without knowledge of what instructions will be given by the Court, since the Court previously on June 27, 1975, indicated it would give the Government's request to charge in substance, as well as certain conflicting instructions tendered by defendants. [Tr. 13,756–57] Pursuant to Rule 30, F. R. Crim. P., defendants reserve the right to make specific objections to the final instructions as the Court intends to give them to the jury.

Defendants maintain a general objection to all comments on the evidence proposed by the Government, including without limitation questions proposed for suggestion to the jury, but do not specify those objections in light of the Court's ruling that it will not make any comment on the evidence in its charge. Further, by not specifically objecting to any portion of a Government request, defendants do not withdraw or waive their request that their requested instructions be given on the subjects given by the Government's requests.

Gov't Request No. 1 (Direct & Circumstantial Evidence): Defendants object to this request as an incomplete statement of law on this subject, but consent to its being given to the jury provided defendants' requests 49 through and including 54 pertaining to this subject are also given.

Gov't Request No. 2 (Tables, Charts, Summaries): Defendants object to this request as (1) an improper and inaccurate comment on the evidence and an invasion of the jury's province, and (2) an incorrect statement of the law as to the jury's duty to examine the foundation and reliability of tables, charts, and summaries.

Gov't Request No. 3 (Credibility of Witnesses): Defendants object to this request as (1) a partial and incomplete statement

of the law on this subject which is more fully and accurately set forth in defendants' requests 64 and 65, (2) an inaccurate statement of the law with respect to its statement that greater weight should be given to documents than testimony in the event of conflict, and (3) as an invasion of the jury's province to decide issues of fact and credibility.

Gov't Request No. 4 (Expert Testimony): Defendants object to this request as (1) an improper comment on the evidence, (2) an invasion of the jury's province, and (3) an inaccurate statement of the law with respect to the weight which may be attached to expert testimony and the role of the jurors in determining the facts.

Gov't Request No. 5 (Absence of Certain Conspirators): Defendants object to this request as (1) an improper and prejudicial statement to the jury regarding absent defendants which is totally unnecessary since the Court has stated that the indictment will not be given to the jury, and (2) an inaccurate statement of the law of what matters the jury should consider.

Gov't Request No. 6 (Sherman Act Summarized): Defendants object to this charge as (1) unnecessarily referring to the interstate commerce issue which is not in issue and should not be considered or mentioned to the jury, and (2) confusing to the jury in that it unnecessarily quotes an excerpt of statutory language, refers to a multiplicity of concepts, such as "understanding," "concert of action," and "combination," and summarizes too briefly the law of conspiracy to constitute an adequate instruction of the law on that subject.

Gov't Request No. 7 (Purpose of the Sherman Act): Defendants object to this charge as (1) stating the purpose of the Sherman Act which is not relevant to any issue the jury must decide, (2) inaccurately stating the purpose of the Sherman Act, (3) placing before the jury the concept of an "unreasonable interference" with competitive pricing which is not relevant to any issue the jury must decide and which is potentially confusing to the jury and prejudicial to defendants, and (4) confusing the jury and prejudicing to defendants by referring to the interstate commerce requirement which is not in issue.

Gov't Request No. 8 ("Conspiracy defined"): Defendants object to this request as (1) inaccurately stating the law of conspiracy in several key respects, particularly in its misstatement of the elements that must be proven to establish partici-

pation in a conspiracy, (2) submitting to the jury issues not properly before it, such as joinder in a conspiracy due to economic duress, (3) misstating the ultimate issue to be decided by the jury, (4) confusing the applicable burden of proof on the Government, (5) confusing the jury by reference to eight undefined terms purportedly synonomous with "conspiracy," (6) referring to general experience which is neither correct nor in evidence regarding what is "common" or "rare" in criminal conspiracies generally, and (7) prejudicially commenting on the evidence and invading the jury's province.

Gov't Request No. 9 (Membership in a Conspiracy): Defendants object to this request as an incomplete and therefore inaccurate statement of the law on this subject, but consent to its being given only if it is given in conjunction with defendants' requests 40 and 41 in their entirety.

Gov't Request No. 10 (Declarations of Conspirators): Defendants object to this request as (1) incompletely and inaccurately stating the law regarding declarations of conspirators, particularly in not specifying that the declarant must be found by independent evidence to have been a conspirator at the time the declaration was made, in not requiring that the jury consider the nature of each defendant's understanding, if any, of the alleged conspiratorial purpose before binding him or it with the declaration, and in not accurately or adequately defining the amount and nature of independent evidence required to establish the "connection"; (2) confusing the jury and potentially prejudicing defendants in its unnecessary discussion of the concepts "hearsay" and the "co-conspirator" exception to the hearsay rule; and (3) improperly and prejudicially communicating to the jury belief or opinion that a conspiracy did in fact exist. Defendants have submitted supplemental charges on this subject.

Gov't Request No. 11 (Corporations Act Through Agents): Defendants object to this request as (1) inaccurately stating the law on this subject particularly on the reference to the possibility of defendants being bound by acts within the apparent authority of their agents, and (2) being an incomplete statement of the law which is more fully and correctly stated in defendants' requests 44 and 45.

Gov't Request No. 12 (Liability of Individual Defendants): Defendants object to this request as (1) inaccurately and incompletely stating the applicable law which is covered more fully and correctly in defendants' request 46 and, particularly, does not require the jury to find that the individual defendant understood the action of a coemployee to have been undertaken in furtherance of the conspiracy charged; (2) stating the law in a manner biased to the government in not stating that the individuals may be found not guilty even if the corporations are found guilty; and (3) improperly and prejudicially commenting on the evidence.

Gov't Request No. 13 (Offense Charged): Defendants object to this request as (1) inaccurately stating the law of conspiracy, (2) misstating the law relating to variance in the proof of several conspiracies rather than one conspiracy as charged, (3) unnecessarily and prejudicially referring to defendants not on trial, (4) unnecessarily and prejudicially referring to the grand jurors, (5) inaccurately and incompletely stating the elements of the offense charged, (6) commenting on the evidence and invading the jury's province in areas such as the relationship of credit terms to price, (7) misstating the law and the Court's prior rulings, as well as confusing the jury, with respect to the issues relating to materials handling and packaging.

Gov't Request No. 14 (Price Fixing Per Se Unreasonable): Defendants object to this request as (1) potentially confusing to the jury and prejudicial by addressing the subject of an "unreasonable" restraint of trade which is not in issue where the offense charged is, according to the government's theory, a *per se* violation; (2) prejudicially varying from and misstating the charge in the indictment; (3) inaccurately stating the law relating to conspiracy and variance, particularly with respect to the government's burden to prove the unitary nationwide conspiracy charged; (4) commenting on the evidence improperly and invading the jury's province; and, (5) improperly and prejudicially suggesting the existence of evidence not in the record.

Gov't Request No. 15 (Means & Methods): Defendants object to this request in all its subsections on the general grounds that it is (1) an improper, highly selective and prejudicial comment on the evidence and invasion of the jury's province; (2) an inaccurate and incomplete statement of the law in several key respects, including without limitation the Robinson-Patman Act, conscious parallelism, buyer fraud, public price an-

nouncements, and predatory practices; (3) an inaccurate statement of the evidence which assumes facts not in evidence; and, (4) an inaccurate and prejudicial explanation of the charge contained in the indictment.

Gov't Request No. 16 (Statute of Limitations): Defendants object to this request as (1) inaccurately stating the law in key respects such as by suggesting (a) that all defendants may be guilty if anyone is, (b) that a conspiracy is presumed to continue from any act in furtherance of it without qualification, and (c) that any act employed by defendant in this District is sufficient to satisfy venue; (2) incompletely stating the law on this subject which is more fully set forth in defendants' requests 21 through 25; and, (3) improperly and prejudicially commenting on the evidence and invading the jury's province.

Gov't Request No. 17 (Meetings Among Corporate Officials): Defendants object to this instruction in that (1) it ignores the presumption of innocence, (2) it incorrectly states the law regarding "opportunity" evidence, and, (3) it improperly and incorrectly comments on the evidence and invades the jury's province.

Gov't Request No. 18 (Denials of Agreement): Defendants object to this instruction as (1) misstating the law relating to the elements for finding a person to be a conspirator and to the weight to be given denials of agreement against circumstantial evidence, (2) commenting prejudicially and incompletely on the evidence regarding this subject and invading the jury's province to decide questions of fact and credibility, and (3) confusing.

Gov't Request No. 19 (Success Immaterial): Defendants object to this request as (1) commenting incompletely and prejudicially on the evidence and (2) stating incorrectly that a finding of agreement would violate the law without also stating that the agreement must be found within the statutory period.

Gov't Request No. 20 (Good Motives Immaterial): Defendants object to this request as (1) inaccurately and incompletely stating the law relative to the requirement a person be proven a "witting conspirator," the relevance of legal advice, and the relevance of the Robinson-Patman Act; and (2), commenting inaccurately and prejudicially on the evidence and invading the jury province.

Gov't Request No. 21 (Evidence Must Be Viewed As Whole): Defendants object to this request because (1) it misstates the burden of proof applicable to the government, (2) it is confusing in key respects including the suggestion that the guilt of one defendant may permit the conviction of all or that the jury has a duty to convict, and (3) it is an improper comment on the evidence and invades the jury's province.

Gov't Request No. 22 (Withdrawal From Conspiracy): Defendants object to this request as inaccurately and incompletely stating the law relative to the issues of abandonment, withdrawal and termination, to the issue of each defendant's understanding, if any, of the conspiratorial purpose, and to the issue of reasonable doubt.

Respectfully submitted,

(Signatures omitted)

DATED: July 1, 1975

SUPPLEMENTAL REQUESTS TO CHARGE FILED BY DEFENDANTS

Defendants request that each of the attached proposed final instructions be incorporated in the Court's charge to the jury. These requests are supplemental to those earlier filed by defendants and are submitted in light of the Court's rejection of certain earlier filed instructions. In submitting these supplemental requests, defendants do not withdraw their request that each of the earlier filed requests for final instruction be given to the jury as tendered to the Court, nor do they waive their position that the refusal to give such instruction is error.

Defendants' Supplemental Request to Charge—Essential Elements of the Offense

SUPPLEMENTAL REQUEST #1

Before you may find any defendant guilty of the offense charged in this indictment, you must find beyond a reasonable doubt that all of the following essential elements are present as to that defendant:

First, there must be evidence which convinces you beyond a reasonable doubt, that a conspiracy existed to raise, fix, maintain and stabilize the prices of sale of gypsum board products.

Second, there must be evidence which convinces you beyond a reasonable doubt that the conspiracy existed after December 27, 1968 and that the particular defendant was a party to it, after December 27, 1968.

Third, the evidence must convince you, beyond a reasonable doubt, that any such conspiracy among defendants constituted a single, overall continuing conspiracy and not a series of separate conspiracies.

Fourth, there must be evidence which convinces you, beyond a reasonable doubt, that the defendant knowingly and consciously joined in and committed itself or himself to the conspiracy charged in the indictment.

Fifth, there must be evidence that convinces you, beyond a reasonable doubt, that an act in furtherance of the conspiracy occurred in the Western District of Pennsylvania at some time after December 27, 1968.

As I have said, before you may find any defendant guilty, you must find all of these elements present beyond a reasonable doubt as to that defendant. If you find that all but one of these elements has been proven beyond a reasonable doubt, you must find the defendant not guilty.

Defendants' Supplemental Request To Charge—Conscious Commitment to a Common Scheme

SUPPLEMENTAL REQUEST #2

Under the law, a conspiracy is a combination of two or more persons to accomplish by concerted action some unlawful purpose or to accomplish some lawful purpose by unlawful means. The gist of the offense is an agreement to disobey or to disregard the law. In the absence of agreement, there can be no conspiracy. It is the existence of an agreement to act together in the future for an unlawful purpose that constitutes the relationship forbidden by law.

No conspiracy in violation of the Sherman Act can be found unless it is established beyond a reasonable doubt that there is conscious and knowing commitment by two or more persons to an agreed-upon plan or scheme to accomplish an unlawful objective. Unless a defendant understands, from something said or done by the others, that he is committed to such a scheme and committed to each other participant in the scheme, that defendant is not a party to a conspiracy and has not violated the law.

Authority:

Preliminary Instructions, Tr. 132–133, and further adapted from *United States v. American Tobacco Co.*, *supra*, ABA Jury Instructions, pp. 169–170. See also *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *United States v. Standard Oil Co. (Ind.), Works, Inc.*, 323 F. 2d 787, 791 (3d Cir. 1963); *United States v. Continental Baking Co.*, 281 F. 2d 137 (6th Cir. 1960); *United States v. Van de Carr*, 343 F. Supp. 993 (C.D. Cal. 1972); *United States v. National Malleable & Steel Castings Co.*, 1957 Trade Cas., Par. 68,890 (N.D. Ohio 1957), *aff'd* 358 U.S. 38 (1958); *United States v. General Motors*, Crim. 47140 (E.D. Mich. 1973).

Defendants' Supplemental Request To Charge—One Single Conspiracy v. Several Conspiracies

SUPPLEMENTAL REQUEST No. 3

The defendants may not be found guilty of offenses not charged in the indictment, so that if you do not find a single over-all conspiracy, as charged, you must find the defendants not guilty even though you may find separate and individual conspiracies were formed within the period covered by the indictment.

Rather than finding that there was one over-all comprehensive conspiracy, as charged, you might find that there were one or two or more conspiracies on small points. The defendants only have to defend what is charged in the indictment, and so you must decide whether you find that there were no conspiracies, or that there were a series over the years of separate conspiracies, rather than the one continuous and comprehensive conspiracy charged.

While a failure to prove all the terms of the one conspiracy charged would not necessarily preclude you from finding that such conspiracy existed, the prosecution has the burden of proving beyond a reasonable doubt that there was but one single conspiracy, that it was a continuing one, and that the acts allegedly done in furtherance of such conspiracy were within the reasonable intendment of the common understanding between the parties.

Authority:

Kotteakos v. United States, 328 U.S. 750 (1946); ***United States v. Central Supply Ass'n***, 6 F.R.D. 526, 528–33 (N.D. Ohio); ***United States v. Johns-Manville Corp.***, Crim. 21–118 (E.D. Pa. 1962); ***ABA Criminal Jury Instructions***, pp. 512–13.

Defendants' Supplemental Request To Charge—Declarations of Co-Conspirators

SUPPLEMENTAL REQUEST #4

Statements made out-of-court as reflected in documents or testimony by persons who are not defendants and who are not employed by defendants must not be considered by you in assessing the innocence or guilt of each defendant unless you find,

first, from other evidence that the alleged conspiracy in fact existed and find, second, from the other evidence that the persons making such statements were themselves in fact participants in the alleged conspiracy at the time their statements were made. In other words, such out-of-court statements made by persons who are not defendants nor employees of defendants may not be considered by you as evidence that the conspiracy charged in fact existed, or as evidence of the scope and purpose of any conspiracy, unless you first find from independent evidence, other than such out-of-court statements, both that there was a conspiracy and that the person making the statement was a party to it. Bear firmly in mind, however, that you may not convict any of the defendants unless the evidence, considered specifically and individually in relation to that defendant, establishes, beyond a reasonable doubt his or its membership and participation in the conspiracy charged.

Defendants' Supplemental Request To Charge—Need to Determine Scope of Each Defendant's Agreement

SUPPLEMENTAL REQUEST #5

Because the gist of the offense charged is a continuing agreement to raise, fix, maintain and stabilize prices of gypsum products, it is essential for you to determine what kind of agreement or understanding, if any, existed as to each defendant. Each defendant is chargeable with the acts of his or its fellow defendants and alleged coconspirators only if the acts are done in furtherance of the joint venture as he or it understood it. No defendant is to be held responsible for what some of the alleged conspirators, unknown to the rest, do beyond the reasonable intendment of the common agreement or understanding, if any, to which you may find him or it a party.

Authority:

United States v. Borelli, 336 F. 2d 376, 384 (2nd Cir. 1964), *cert. denied*, 379 U.S. 960 (1965); ***United States v. Johns-Manville*** (E.D. Pa. 1962), as reprinted in ***ABA Instructions in Criminal Cases***, p. 513 (1965).

Defendants' Supplemental Request To Charge—Advice of Counsel

SUPPLEMENTAL REQUEST #6

It is not a defense to an alleged violation of the Sherman Act that a defendant in entering into an agreement with competitors to fix prices did so in reliance upon the advice of counsel.

However, if a defendant acts independently in following the advice of counsel, rather than pursuant to an agreement with competitors, the defendant has not violated the law.

Defendants' Supplemental Request to Charge—Legal Advice and Conscious Acts of Commitment

SUPPLEMENTAL REQUEST #7

A person is entitled and encouraged to seek and rely upon the advice of counsel in guiding his business conduct. While the fact that counsel may have approved certain conduct as lawful does not constitute a defense to a Sherman Act violation if the conspiracy charged is found from the evidence, a defendant who pursues a course of conduct because he understands it to be lawful based upon the advice of counsel, and who does not understand that he has committed himself to other alleged co-conspirators to pursue that course of conduct pursuant to a common scheme, is not a conspirator and has not violated the law by engaging in that course of conduct.

Defendants' Supplemental Request to Charge—Seller Free to Sell at Any Price

SUPPLEMENTAL REQUEST #8

So far as the Sherman Act (Section One) is concerned, any person or company may sell its products at any price at which it desires to sell, and may sell such products in any market which it desires to enter, so long as such prices are not the product of a conspiracy. Similarly, any person or company is free to make and publicly announce its pricing and other marketing decisions with the hope or expectation that such decisions and announcements will have the effect of raising or stabilizing prices, provided that such decisions were not made pursuant to any agreement with any competitor.

Defendants' Supplemental Requests to Charge—Robinson-Patman Act Prohibition Against Discrimination

SUPPLEMENTAL REQUEST #9

Although the freedom of a seller to sell his goods at any price he chooses is not limited by the Sherman Act, the seller's free-

dom to price as he chooses is limited by the Robinson-Patman Act, one of the antitrust laws of the United States. The Robinson-Patman Act prohibits discrimination by a seller in its pricing of goods of like grade and quality in connection with its sales of such goods to customers who compete with each other, unless such price discrimination is made by the seller in good faith to meet the equally low price of a competitor, or is otherwise justifiable under other provisions of the Robinson-Patman Act.

Defendants' Supplemental Request to Charge—Manufacturer Free to Maximize Profit

SUPPLEMENTAL REQUEST #10

So far as the Sherman Act (Section One) is concerned, it is lawful for any manufacturer to seek to sell its products at the highest prices possible and to maximize its earnings and profits for the benefit of its shareholders and employees.

Defendants' Supplemental Request to Charge—Manufacturer Free to Announce Pricing Decision in Hope Competition Will Follow

SUPPLEMENTAL REQUEST #11

A manufacturer may lawfully make and release a pricing decision to its customers even though competitors are likely to learn of the announcement and even though the manufacturer hopes that its competitors will follow. The fact that competitors—in the exercise of their own judgment—decide to follow the prices of another manufacturer does not establish a price fixing conspiracy, provided the decision of each is not made pursuant to any agreement with its competitors.

Authority:

United States v. General Motors, Crim. 47140 (E.D. Mich. 1973); *United States v. International Harvester Co.*, 274 U.S. 693, 708–9 (1927); *Cole v. Hughes Tool Co.*, 215 F. 2d 924, 940–41 (10th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955).

Defendants' Supplemental Request to Charge—Legality of Buy-Sell Agreements

SUPPLEMENTAL REQUEST #12

Competitors may lawfully agree between themselves to buy and sell any product of their choosing so long as they do not agree on the future prices at which such products may be resold in the marketplace. Such buy-sell agreements are entirely lawful and neither those agreements nor communications between competitors relating exclusively to them constitute violations of the Sherman Act.

Defendants' Supplemental Request to Charge—Competitive Contacts Must Be Presumed Innocent Absent Incriminating Evidence

SUPPLEMENTAL REQUEST #13

A defendant cannot be found guilty of conspiracy merely by association. Thus, defendants are free to meet with and contact each other and may do so without violating the law provided such meetings and contacts are not used for the purpose of entering into or furthering a conspiracy. In the absence of evidence that any meeting or contact between a defendant and its competitors was actually used for the purpose of entering into or furthering the conspiracy charged, such meeting or contact must be presumed innocent.

Authority:

United States v. Basurto, 497 F. 2d 781, 793 (9th Cir. 1974); *United States v. Kompinski*, 373 F. 2d 429, 434 (2nd Cir. 1967); *United States v. Van de Carr*, 343 F. Supp. 993, 1001 (C.D. Cal. 1972); *United States v. Falcone*, 311 U.S. 205, 210 (1940); *Dennert v. United States*, 147 F. 2d 286 (6th Cir. 1945); *United States v. Packard-Bell Electronics Corp.*, Cr. 30158 (S.D. Cal. 1961), ABA Criminal Jury Instructions, p. 472; *United States v. Dide*, 332 U.S. 581, 593 (1948); *United States v. Stromberg*, 268 F. 2d 256, 267 (2d Cir.) *cert. denied*, 361 U.S. 863 (1959); *United States v. Baker*, 499 F. 2d 845, 848 (7th Cir. 1974); *United States v. Minneapolis Electrical Contractors Ass'n*, 99 F. Supp. 75 (D. Minn. 1951), *appeal dismissed*, 207 F. 2d 782 (8th Cir. 1953), ABA Criminal Jury Instructions, p. 323; *United States v. Johns-Manville Corp.*, Cr. 21-118 (E.D. Pa. 1962), ABA Criminal Jury Instructions, p. 501.

Defendant's Supplemental Request To Charge—Circumstantial Evidence Relating To Unexplained Competitive Contacts

SUPPLEMENTAL REQUEST #14

A meeting or contact between a defendant and any of its competitors must be presumed innocent even if no explanation for the meeting or contact appears from the evidence unless you find from all the surrounding circumstances that the only reasonable inference is that such meetings or contact was used for the purpose of entering into or furthering the conspiracy charged. If the circumstances surrounding such an unexplained meeting or contact do not necessarily indicate the existence of the conspiracy, as charged, and may be reasonably explained by other factors supported by the evidence, then such an unexplained meeting or contact must be presumed innocent.

Defendants' Supplemental Request To Charge—Exchange of Price Information By Itself Lawful

SUPPLEMENTAL REQUEST #15

The exchange of pricing information among competitors, by itself, does not constitute a conspiracy to fix prices in violation of the Sherman Act.

Defendants' Supplemental Request To Charge—When Exchange of Price Information Is Not Unlawful

SUPPLEMENTAL REQUEST #16

The exchange of pricing information among competitors cannot be a basis for inferring a conspiracy to fix prices in violation of the Sherman Act unless it is found beyond a reasonable doubt that (a) there was an agreement between competitors to exchange such pricing information, (b) the exchange of pricing information had the effect of stabilizing prices, (c) the purpose of such exchange of pricing information was neither to comply with the good faith meeting-of-competition defense of the Robinson-Patman Act nor to protect the competitors against misrepresentations by their customers as to the prices offered or quoted to them.

Defendants' Supplemental Request To Change—Legality of Robinson-Patman Verification Regardless of Effect on Prices

SUPPLEMENTAL REQUEST #17

Sellers may lawfully contact competitors to confirm or verify a report of a lower price or price quotation to a customer even if the effect of such contacts is to stabilize or increase prices provided that the purpose of such contacts is to comply with the good faith meeting-of-competition defense of the Robinson-Patman Act.

Defendants' Supplemental Request to Charge—Legality of Robinson-Patman Verification Regardless of Agreement To Do So

SUPPLEMENTAL REQUEST #18

Sellers may lawfully agree with each other to contact each other to confirm or verify a report of a lower price or price quotation to a customer provided that the purpose of such contacts was to comply with the good fair meeting-of-competition defense of the Robinson-Patman Act.

Defendants' Supplemental Request To Charge—Legality of Verification to Protect Against Buyer Misrepresentation

SUPPLEMENTAL REQUEST #19

Sellers may lawfully contact competitors to confirm or verify a report of a lower price or price quotation to a customer even if the effect of such contacts is to stabilize or increase prices provided the purpose of such contacts is to protect the sellers against misrepresentations of the customers as to the prices they are being quoted or charged.

Defendants' Supplemental Request To Charge—Legality of Verification To Protect Against Buyer Misrepresentation Regardless of Agreement To Do So

SUPPLEMENTAL REQUEST #20

Sellers may lawfully agree with each other to contact each other to confirm or verify a report of a lower price or price quotation to a customer provided that the purpose of such contacts is to protect the sellers against misrepresentations of the customers as to the prices they are being quoted or charged.

Defendants' Supplemental Request To Charge—Job Price Protection

SUPPLEMENTAL REQUEST #21

The practice of listing or exchanging information between competitors with regard to specific jobs for which job price protection had previously been extended by one or more competitor is not unlawful even if it were done by agreement and even if it tended to stabilize or increase prices.

Authority:

Cement Manufacturers Association v. United States, 268 U.S. 588 (1925); *United States v. Container Corp.*, 393 U.S. 333, 335 (1969).

Defendants' Supplemental Request To Charge—Inference Not to Rest on Speculation

SUPPLEMENTAL REQUEST #22

An inference can be drawn only from definite facts in evidence, and cannot be based on surmise, speculation, conjecture or suspicion; it must be reasonably drawn from, and supported by the facts on which it purports to rest.

Authority:

Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 340-41 (1933); *Byrth v. United States*, 327 F. 2d 917, 920 (8th Cir. 1964), *cert. denied*, 377 U.S. 931 (1964); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, [first trial] 308 F. 2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); [second trial] 223 F. Supp. 712 (E.D. Tenn. 1963), 346 F. 2d 661 (6th Cir. 1965), *cert. denied*, 382 U.S. 904 (1965).

Respectfully submitted,

(signatures omitted)

DATED: July 1, 1975

GOVERNMENT'S SUPPLEMENTAL REQUEST TO CHARGE RE DEFENDANTS' ROBINSON-PATMAN ACT CONTENTIONS

In addition to the government's Request to Charge Number 15(c), which the Court has indicated it intends to give in substance, it is requested that the additional points set forth below be made with respect to it.

These additional points for charge pertain to the Robinson-Patman Act and are necessary and appropriate in light of the closing arguments by defense counsel, to wit:

The Celotex Forms 350 and 360 were created for purposes of Robinson-Patman Act compliance, accompanied by the statement that "It is imperative that competitors' prices or terms of sale be verified beyond all reasonable doubt" (Tr. 14,450–51), and that it was necessary to follow verification procedures with competitors in order to comply with the Robinson-Patman Act (Tr. 14,453–566). These statements are contrary to the law as set forth in Government's Memo in Support of Requests for Charge Relating to the Agreement to Exchange Prices and Other Competitive Information, pp. 13 et seq.

Defense counsel also argued that no records were necessary because the "good faith" could be proved if challenged later by subpoenaing the files and records of the competitor to show that it did in fact have the lower price (Tr. 14,462). This, too, is contrary to the law as set forth in *Knoll Associates, Inc.*, 70 F.T.C. 311 (1966), *set aside and remanded on other grounds*, 397 F. 2d 530 (7th Cir. 1968); and *Colonial Stores, Inc.* v. *Federal Trade Commission*, 450 F. 2d 733, 745–46 (5th Cir. 1971). It is also contrary to Celotex's internal memo. DX (Cel) 9, stating that data to support a price deviation cannot be furnished retroactively.

Accordingly, we request that the following additional points be included in the charge to the jury:

(a) That the good faith meeting competition defense of the Robinson-Patman Act does not require that the reported lower

price by a competitor must be verified beyond all reasonable doubt, but requires only a reasonable belief that the equally low price exists;

(b) That the Robinson-Patman Act does not require that a seller make direct contact with his competitor to determine whether the reported offer of a lower price is in fact true; and

(c) That a seller does not necessarily establish his "good faith" simply by proving through his competitor's records that the competitor had in fact offered a similar low price to the customer. In other words, the seller must show his "good faith" at the time he made the sale. Proof made at a later time from the competitor's records that the competitor actually offered to sell at a similar low price is not sufficient to establish the seller's "good faith" at the time he made the sale.

Respectfully submitted,

(signature omitted)

DATED: July 7, 1975

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GEORGIA-PACIFIC CORPORATION'S SUPPLEMENTAL REQUESTS AS A RESULT OF REBUTTAL SUMMATION

GEORGIA-PACIFIC

SUPPLEMENTAL REQUEST A

Mr. Fricano in his summation said in substance that there cannot be fraud without a legally binding contract. That is not a correct statement of the law. Legally, there may be fraud without a legally binding contract.

GEORGIA-PACIFIC

SUPPLEMENTAL REQUEST B

Members of the jury, Mr. Fricano in his rebuttal summation made reference to certain people who did not testify here and in effect asked why they were not called as witnesses. That comment was improper and you should disregard it.

GEORGIA-PACIFIC

SUPPLEMENTAL REQUEST C

In your deliberations you may not give any weight whatsoever to the fact that a particular person was not called by a defendant to be a witness.

GEORGIA-PACIFIC

SUPPLEMENTAL REQUEST D

One reason why Mr. Fricano's comment regarding persons who were not called as witnesses was improper is that it is contrary to the presumption of innocence. Defendants have no

obligation to produce any witness. It is the government's burden to prove its case beyond a reasonable doubt and to produce witnesses as it desires them to meet that burden.

Stowe Township v. Std. Life Ins. Co., 507 F. 2d 1332 (3d Cir. 1975).

DATED: July 8, 1975

[DEFENDANTS' EVIDENTIARY HEARING EXHIBITS]

DEFENDANTS' EXHIBIT A-2

A-2

October 30, 1970

Daniel M. Manscom
Assistant Director for Evaluation

Henry I. Lipsky
Liaison Officer

Gypsum Wallboard Investigation
File No. 701 0078
Georgia Pacific, et al

On October 30, 1970, the Antitrust Division's Liaison Officer advised me that a decision was finally reached by the Division with respect to the above matter. The Antitrust Division intends to conduct a grand jury investigation to ascertain whether there is criminal contempt of its outstanding judgment in Civil Action No. 8017, District of Columbia, D.C., filed on May 15, 1951.

Henry I. Lipsky
Liaison Officer

HILipsky/jcb

cc: Joseph A. Jeffrey.

BEST COPY AVAILABLE

DEFENDANTS' EXHIBIT B-13

B-13

Served on America Gyp. Co. March 20 1962

IN THE DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

TEXAS GYPSUM COMPANY, INC.,
Plaintiff,
vs.
UNITED STATES GYPSUM COMPANY, KAISER GYPSUM COMPANY, INC., NATIONAL GYPSUM COMPANY, THE CELOTEX CORPORATION, and AMERICAN GYPSUM COMPANY,
Defendants.

CIVIL ACTION NO. 2321

PLAINTIFF'S ORIGINAL BILL OF COMPLAINT

COMES NOW TEXAS GYPSUM COMPANY, INC., Plaintiff herein, and being a corporation organized and existing under the laws of the State of Texas, and having its principal office and place of business in El Paso County, Texas, complaining of UNITED STATES GYPSUM COMPANY, a corporation, having its principal office and place of business in the State of Illinois; KAISER GYPSUM COMPANY, INC., a corporation, having its principal office and place of business in the State of Washington; NATIONAL GYPSUM COMPANY, a corporation, having its principal office and place of business in the State of Delaware; THE CELOTEX CORPORATION, a corporation, having its principal office and place of business in the State of Delaware, and AMERICAN GYPSUM COMPANY, a foreign corporation, and for cause of action, Plaintiff respectfully alleges:

1. The cause of action herein alleged arises under and is based upon the Anti-Trust Laws of the United States, to-wit: Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Price Discrimination Act, 49 Stat. 1526, 15 U.S.C.A., Section 13; Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C.A., Section 15; and Section 16 of the Clayton Act, 38 Stat. 731, 15 U.S.C.A., Section 26; and 15 U.S.C.A., Section 1.

2. Each of the Defendants transacts business in, and is found within, the Western District of Texas. The statutory agents for service of process on each Defendant other than the Defendant AMERICAN GYPSUM COMPANY is The CT Corporation System, Republic National Bank Building, Dallas 1, Texas. The Defendant, AMERICAN GYPSUM COMPANY, may be served by service of process upon its agent, Obley L. Smith, 4212 Hookheath, El Paso, Texas.

3. Plaintiff, TEXAS GYPSUM COMPANY, INC., was organized and came into existence as a corporation in the year 1960, and thereupon built and erected in El Paso County, Texas, a plant in which to make gypsum wallboard. Plaintiff, since approximately December 1, 1960, has manufactured for the trade the article known as wallboard, used in the construction of houses and buildings, and in this business Plaintiff was in direct competition with the Defendants, UNITED STATES GYPSUM COMPANY, INC., KAISER GYPSUM COMPANY, INC., NATIONAL GYPSUM COMPANY, THE CELOTEX CORPORATION, and AMERICAN GYPSUM COMPANY, as well as with other corporations who are not named as defendants in this suit,

4. The line of trade and commerce involved in this action is the sale at wholesale in Texas, and in other States, particularly in the States of New Mexico, Arizona and Colorado, of wallboard, made principally of gypsum, which board is made in different sizes and thicknesses. The prices hereinafter stated are the prices for one-half inch board, it being the size of board most commonly used and sold.

5. The Defendants are some of the largest producers, manufacturers and distributors of wallboard in the United States, and operate in most of the States in the United States, including, among other States, Texas, Arizona, New Mexico and Colorado. The Defendants sell wallboard throughout the said States, as well as throughout most of the other States of the United States, which wallboard is sold by them to dealers, who in turn sell it to contractors and builders for use in the construction of residences and other buildings. Plaintiff therefore alleges that the Defendants

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are engaged in interstate commerce, and were so engaged at all times material to this action.

6. A large part of the board manufactured by the Defendants, and also a large part of that manufactured by Plaintiff, TEXAS GYPSUM COMPANY, INC., is sold by dealers handling their respective products to builders who are engaged in building new residences in subdivisions. Prior to the entry of Plaintiff into the manufacture and sale at wholesale of gypsum wallboard, the custom and practice of each of the Defendants was to deliver to their dealers in El Paso County, Texas, and in other areas, wallboard in carload lots f.o.b. the dealer's yard.

7. During the period of time covered by this action, as above stated, Defendants in the course of interstate commerce have exacted prices from some of their customers in El Paso County which, by reason of discounts, rebates, unloading allowances and terms not accorded to all purchasers on proportionately equal terms, were lower than prices exacted by said Defendants for products of like grade and quality from less favored customers in other parts of Texas and in other States in which said Defendants sell and deliver wallboard. The discounts, rebates, unloading allowances and other such terms, which thereby vary the net price to Defendants' dealers from the published prices established by them, vary from 5% to 10%, and bear no uniform relation to production, selling and transportation costs. Such variations in prices exacted by Defendants constitute price discriminations, and the effect thereof may be substantially to lessen competition, to tend to create a monopoly in the line of commerce involved, and also to injure, destroy and prevent competition by Plaintiff with these Defendants.

8. Defendants also in the course of interstate commerce, have exacted prices from some of their customers in places other than El Paso County, Texas, among them being in the cities of Fort Worth, Dallas and San Antonio in the State of Texas, and in cities of Phoenix, Arizona, Denver, Colorado, and various cities in

the State of New Mexico, which prices by reason of discounts, rebates, unloading allowances and other terms not accorded to all purchasers on proportionately equal terms were lower than prices exacted by Defendants for products of like grade and quality from less favored customers in said cities and towns in said States and in other States in the United States in which Defendants operate. The said discounts, rebates, unloading allowances and other such terms were granted by Defendants only in cities and market areas into which this Plaintiff has sold and delivered wallboard, and such discounts, rebates, unloading allowances and other such terms were given by these Defendants only upon Plaintiff entering each of said markets respectively. The discounts, rebates, unloading allowances and other such terms granted by Defendants from its published prices varied from 5% to 10%, and bear no uniform relation to production, selling and transportation costs. Such variations in prices exacted by Defendants constitute price discriminations, and the effect thereof may be substantially to lessen competition, to tend to create a monopoly in the line of commerce involved, and to injure, destroy and prevent competition by Plaintiff with Defendants.

9. By reason of the price discriminations above set out, Defendants sold their gypsum wallboard at a less price in the particular communities where Plaintiff is engaged in business than other places, and Defendants, while maintaining a higher level of prices in other market areas of the United States which Plaintiff had not entered engaged in undercselling Plaintiff in those particular localities and markets which Plaintiff had entered, the effect of which may be substantially to lessen competition or tend to create a monopoly, injure, destroy and prevent competition by Plaintiff with Defendants.

10. The acts above alleged on behalf of these Defendants result both from individual, independent actions and from acts done by way of agreement, understanding, and in concert with each other thereby constituting a combination and conspiracy between the Defendants to engage in price discrimination.

11. The acts of price discrimination by each of these Defendants, acting in concert with each other and individually, have caused Plaintiff to lose a large part of its sales, and have caused Plaintiff to withdraw from some markets which it had entered. Furthermore, Plaintiff, in all probability, will be driven by said acts on the part of Defendants from other markets which it has entered, and in which it is at this time selling and delivering wallboard, and if said acts on the part of Defendants continue, Plaintiff, in all probability, will be driven from the business of manufacturing and selling wallboard, and Plaintiff will thereby not only lose the profits it would have made upon the sales which it has lost to this date, and upon the sales which it otherwise would make subsequent to this date while it still continues in business, but, if driven from business, as the probable prospect for it appears to be, if the said Defendants be not enjoined by this Court from continuing the illegal acts herein alleged, will lose its investment in its plant and business located in El Paso County, Texas, all to its damages to the date of filing this Complaint in the sum of Six Hundred Thousand and no/100 Dollars ($600,000.00).

12. That the acts hereinabove set out and described on the part of the Defendants have caused, are causing and will cause Plaintiff irreparable injury, in that it has lost, and will lose, a substantial part of its business, and will be driven out of the business of manufacturing and selling wallboard, which injuries are irreparable and for which Plaintiff has no adequate remedy at law. That by reason thereof, Plaintiff is entitled to a temporary injunction restraining Defendants, UNITED STATES GYPSUM COMPANY, KAISER GYPSUM COMPANY, INC., NATIONAL GYPSUM COMPANY, THE CELOTEX CORPORATION, and AMERICAN GYPSUM COMPANY, from the commission of said acts of which Plaintiff herein complains, and upon final hearing hereof to a permanent injunction so restraining these Defendants.

WHEREFORE, Plaintiff prays: (1) that process be issued to Defendants and served upon each of them as by law provided; (2) that upon hearing hereof Plaintiff have, first, a temporary injunction

restraining Defendants from the commission of the acts on their part hereinabove described; (3) that upon final hearing hereof, Plaintiff have judgment against the Defendants both jointly and severally, for the sum of Six Hundred Thousand and No/100 Dollars ($600,000.00), plus additional damages from date of filing this Complaint to date of trial; (4) that said judgment be trebled by the Court as provided by law; (5) that the Court determine, and that there be added to said trebled judgment and made a part thereof, a reasonable attorneys' fee for the services of Plaintiff's attorneys; (6) that Defendants, their agents, servants and employees be enjoined permanently from the further commission of the acts complained of herein; (7) that Plaintiff have its costs herein expended; and (8) that Plaintiff have such other and further relief as to the Court may seem just and proper.

J. F. Hulse
of Counsel

of SCOTT, HULSE, MARSHALL & FEUILLE
1100 First National Building
El Paso, Texas
Attorneys for Plaintiff.

DEFENDANTS' EXHIBIT D-4

P-22-1963 DOCKET

TITLE OF CASE	ATTORNEYS
JOSE DAVARCO, JOHN DAVARCO, JR., FRANK DAVARCO and DEXTER DAVARCO and ROBERT B. LEATHE, ESQ., Receiver (intervening plff) v. UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, [illegible]	For Plaintiff: Adelman & Levine; James W. Tracey, III for Receiver; For Defendant Gypsum Co.: for National Gypsum Co. [illegible]

Nature of action: To recover treble damages due to violation of the Sherman Act

Jury trial demanded by Plff.

DATE	PLAINTIFF'S ATTORNEY	FEES		DATE	DEFENDANT'S ATTORNEY	FEES	
2/26/63	C & T	15	00				
2 Mar	T. C. B. THIAS		15				

DISPOSITION OF DEPOSITS		
TO WHOM PAID	AMOUNT	
		R. Francis Deloney for Natl. Gypsum Co. [illegible] for U.S. Gypsum Co.

1962		
July 19	Complaint Filed	
" 19	Summons exit	
" 19	Plff's. demand for jury trial filed	
Sep. 9	Plaintiffs' interrogatories filed.	
" 13	Appearance of Cushman & Obert Esqs. for National Gypsum Co. filed.	
" 17	Notice of National Gypsum Co. to take deposition of plaintiffs, filed.	
" 21	Stipulation extending time of Allied Chemical Corp. to answer, etc., with Clark's approval, filed.	
" 22	Stipulation extending time for National Gypsum Co. to answer, etc. to 9/26/62 and Order approving same, filed.	
" 23	Plaintiffs objections to depositions scheduled by defendant, filed.	
" 30	Summons as to National Gypsum Co. and Barrett Division-Allied Chemical Corp. returned "on 8/4/62 served, and on 8/20/62 served United States Gypsum Co. and East Wall Gypsum Co." and Filed.	
Oct 5	Appearance of Benjamin W. Cuirg, Jr., Esq. and Russell C. Dilks, Esq. for United States Gypsum Co., Filed.	
" 6	Stipulation extending time of United States Gypsum Co. to file answer, etc., filed.	
" 10	Stipulation extending time of Eastwall Gypsum Co. to answer, etc. to 10-10-62, with Clark's approval, filed.	
" 11	Plaintiffs notice of taking deposition of William E. Hogan, filed.	
" 12	Motion of U.S. Gypsum Co. to stay taking of deposition, filed.	
" 19	Stipulation extending time of United States Gypsum Co. to object to plffs. interrogatories to 10-10-62, filed.	
" 20	Stipulation extending time of Eastwall Gypsum Co. to object to plaintiffs interrogatories to 9-27-62, filed.	
" 26	Stipulation extending time of National Gypsum Co. to answer, etc. to 10-10-62 and Order approving same, filed.	RCB
" 27	Objections of Eastwall Gypsum Co. to plaintiffs interrogatories, filed.	
" 27	Defendants motion to stay discovery, filed.	
" 27	Defendants motion to dismiss complaint, filed.	
Nov 13	Objections of National Gypsum Co. to plffs. interrogatories, filed.	
" 21	Order designating case as protracted under Rule 12(d) and assigning case to Freedman J, filed. Noted 10/24/62	WJC
Dec. 3	Objections of Barrett Division, Allied Chemical Corp. to plaintiff's interrogatories filed.	
63		
Jan 9	Order of Court fixing 1/16/63 at 10:30 A.M. for a preliminary conference, filed. 1/10/63 noted & copies mailed.	ALF
May 2	Order of Court fixing 5-15-63 at 2:30 p.m. for a preliminary conference, filed. 5-3-63 noted & notice mailed.	"
" 31	Order of Court granting plaintiff leave to file amended complaint and as to filing answers etc. thereto, staying all discovery proceedings, etc., filed. 6-1-63 noted & copies mailed	"
Jun 10	Transcript of 5-15-63 re: preliminary conference, filed.	
" 19	Amended complaint, filed.	
" 28	Affidavit of service re: amended complaint, filed.	

(continued on page 2)

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James McElroy, et al v. U.S. Gypsum Co., et al C.A. 61-[illegible]

1963		
Sep 9	Defendants' motion to dismiss amended complaint, filed.	
Sept. 30	Argued sur plaintiff's motion for continuance of argument on defendant's motion to dismiss complaint, now appearing on argument list of 10/9/63.	
	En Dec: Plaintiff's motion denied.	ALF
Oct 2	Petition of R.E. Lasker to intervene as party plff., etc., filed.	
" 4	Order of Court that petition of R. E. Lasker to intervene as a party plaintiff be argued at the time of argument on defendants' motion to dismiss the amended complaint, listed for 10/9/63, etc., filed. (10/4/63 notice mailed)	ALF
Oct. 10	Argued sur defendant's motion to dismiss complaint and amended complaint, and motion of State Court Receiver to intervene as party Plaintiff. C.A.V.	ALF
Nov.27	Affidavit of Melvin Lashner, filed.	
Dec. 20	Defendants' motion to strike affidavits of receiver and of counsel for plaintiffs, filed.	
" 6	Affidavit of Melvin Lashner, filed.	
" 9	Affidavit of R.E. Lasker with regard to deft's. motion to dismiss complaint and receiver's petition to intervene, filed.	
Dec. 27	Counter-affidavit of Alexander E. Rabin, filed.	
" 30	Order of Court suspending action on motion to dismiss, to quash affidavits and petition of receiver for leave to intervene for 60 days, etc., filed. 12-31-63 entered & copies mailed.	ALF
1964		
Feb. 18	Order of Court granting leave to all parties to file supplemental briefs and affidavits within 15 days, filed. (2/19/64 entered and copies mailed)	ALF
Mar.10	Order of Court DENYING defendants' motion to dismiss; GRANTING petition of receiver for leave to intervene; and DENYING defendants' motion to quash affidavits of plaintiffs' counsel and of receiver, filed. 3-11-64 entered & copies mailed.	
" 18	Defendant's motion for certification under 28 U.S.C. Sec. 1292 (b), filed.	
" 19	Order of Court DENYING motion for certification under Sec. 1292 (b), filed.	
Mar. 30	Answer of Defendant Eastwall Gypsum Company, and Counterclaim, filed.	
" 30	Answer of Defendant Barrett Division, Allied Chemical Corp., to amended complaint, filed.	
" 31	Answer of Defendant United States Gypsum Co. and Counterclaim, filed.	
" 31	Answer of Defendant National Gypsum Company, to amended complaint and Counterclaim, filed.	
" 31	Case ready for trial.	
" 31	Order of Court setting Friday, April 3, 1964 at 2 P.M. In Chambers re: pre-trial conference, filed.	ALF
Apr. 6	Order of Court fixing time for parties to file and answer interrogatories and for filing Pre-trial memoranda.	

	Amendment to answer of Bestwall Gypsum Co., filed.			
" 9	Amendment to answer of United States Gypsum Co., filed.			
" 10	Transcript of pre-trial conference of April 3, 1964 (in chambers), filed.			
" 15	Plaintiffs answer to counterclaim of United States Gypsum Co., National Gypsum Co. and Best Wall Gypsum Co., filed.			
" 15	Amendments to plaintiffs' interrogatories, filed.			
" 16	Plaintiff's pre-trial memorandum, filed.			
" 16	Interrogatories of U.S. Gypsum Co. and National Gypsum Co. to Plaintiffs, filed.			
" 17	Objections of J.DiNarco, et al to defts' interrogatories, filed.			
" 17	Objections of Bestwall Gypsum Co. to amendments to piffs' interrogatories, filed.			
" 17	Objections of National Gypsum Co. to piffs' amended interrogatories, filed.			
" 18	Objections of United States Gypsum Co. to plaintiffs' interrogatories, filed.			
" 18	Pre-trial memorandum of United States Gypsum Co., Nat. Gypsum Co., and Bestwall Gypsum Co., filed.			
" 19	Stipulation of counsel extending time of Barrett Division-Allied Chemical Corp, to file pre-trial memorandum and objections to interrogatories, and Order approving same, filed		ALR	
" 19	Pre-trial memorandum of Barrett Division, Allied Chemical Corp., filed.			
" 19	Objections of Barrett Division - Allied Chemical Corp. to plaintiffs' interrogatories as amended, filed.			
ay 4	Objection of plaintiff, Robert E. Lantzy, Receiver, to defendant's United States Gypsum Co. and National Gypsum Co's interrogatories, filed.			
Oct. 8	Order of Court reassigning this protracted case to Higginbotham, Jr., J., filed. 10-8-64 entered & copies mailed.			TJC
965				
an.29	Order fixing pre-trial conference for February 5, 1965, at 2 P.M. and that counsel submit proposed timetable for completion of discovery, etc., filed. (Pre-Trial Conference held 2/5/65) 2/1/65 Order (in form of letter) entered.			ALR
ar. 8	Plaintiffs' amended pretrial memorandum, filed.			
" 8	Defendants' further preliminary pre-trial memorandum, filed.			
eb.11	Transcript of preliminary pre-trial conference held 2/5/65, filed.			
ar. 1	Argued sur defendants' objections to plaintiff's interrogatories and plaintiff's objections to defendants' interrogatories C.A.V.			ALR
" 14	Transcript of hearing of 3-9-64, filed.			
" 26	Plaintiffs' amended interrogatories, filed.			"
Aug 3	Order ruling on discovery motions, filed. 9-1-65 entered & copies mailed.			"
Oct 5	Order of Court fixing Thursday October 14, 1965 at 4:15 P.M. hearing, filed. 10-6-65 entered & copies mailed.			"
" 7	Order of Court fixing Friday October 15, 1965 at 9:30 A.M. for hearing, rather than October 14, 1965, filed. 10-8-65 entered & copies mailed.			"
" 28	Hearing re type of order as to confidentiality of material - (Order signed) Hearing re time schedule for answering interrogatories (Order to be submitted) All answers to be served by 12/28/65.			

1965				
73 Oct. 20	Order of Court ruling on defts. answers to interrogatories, filed 10-21-65 entered & copies mailed.		ALR	
74 Nov. 1	Order of Court directing all parties to answer all outstanding interrogatories on or before Dec. 20, 1965, etc., filed 11/2/65 entered & copies mailed.		ALR	
75 " 1	Transcript of argument on Oct. 29, 1965, filed.			
76 Nov. 22	Answers of Bestwall Gypsum Co. to plaintiffs' interrogatories filed.			
77 " 22	Answers of Allied Chemical Corp. (Set 1) to plaintiffs' interrogatories, filed.			
78 " 22	Notice of U.S. Gypsum Co., et al of taking depositions of Dexter DiNarco, et al, filed.			
79 " 22	Answers of U.S. Gypsum Co. to plaintiffs' interrogatories, filed.			
80 " 22	Sealed answers to Bestwall Gypsum Co. to certain of plaintiffs' interrogatories, filed.			
81 " 22	Sealed answers of U.S. Gypsum Co. to certain of plaintiffs' interrogatories, filed.			
82 Dec. 22	Answers of National Gypsum Co. to plaintiff's interrogatories, filed.			
83 " 22	Sealed answers of National Gypsum Co. to certain of plaintiffs' interrogatories, filed.			
84 Dec. 22	Sealed answers of Allied Chemical Corp. to plaintiffs' interrogatories, Set II, filed.			
85 Dec. 22	Plaintiffs' answers to defendants' interrogatories, filed.			
86 " 27	Plaintiffs motion for a protective order and notice thereof, filed.			
87 " 30	Order of Court fixing Jan. 5, 1966 at 4:00 p.m. for hearing on piffs. notice of motion for a protective order, etc., filed. 1-3-66 entered & copies mailed		ALR	
1966				
88 Jan. 7	Order of Court denying piffs. motion for a protective order to stay the taking of depositions by defts. and fixing time for taking of depositions, filed. 1-10-66 entered & notice mailed		ALR	
Jan. 5	Argued sur plaintiff's motion for protective order So Ord: Motion Dismissed		ALR	
89 Feb. 1	Transcript of Jan 25, 1966 re: hearing in re examination of documents, filed.			
90 Mar. 1	Defendants' motion for production of documents, filed.			
91 " 3	Deposition of D. DiNarco, filed.			
92 " 4	piffs. motion for protective order and notice thereof, filed.			
93 " 4	piffs. motion for production of documents etc., filed.			
94 " 4	piffs. motion to require further answers to interrogatories, filed.			
95 " 4	Appearance of A. M. Kaplan, Esq. as co-counsel for piffs., filed.			
96 Apr. 5	Notice of United States Gypsum Co. of taking deposition of Frank Greenberg et al, filed.			
97 " 6	Corrected notice of U. S. Gypsum Co., et al to take depositions of F. Greenberg, filed.			
" 12	Hearing re defendants' motion for production of documents So Ord: The Court directs plaintiff to produce documents for the Years 1956 to 1961 As plaintiff's motion for production of documents, the Court directs that defendants produce all documents for a period of two weeks for inspection			ALR

DATE 1966	PLEADINGS-PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	JUDGE'S INITIALS
98 Apr 21	Letter to Higginbothom Jr. J. from John G. Harkins Jr. Esq., filed.			
99 " 21	Letter to Higginbothom Jr. J. from Benjamin N. Cardozo Jr. Esq., filed.			
100 " 21	Notice of United States Gypsum Co. et al to take depositions of C. A. Cavaney, filed.			
101 May 24	Additional response of U. S. Gypsum Co. to interrogatories, filed.			
102 June 3	Transcript of April 12, 1966 continued argument re: discovery, filed.			
103 Oct. 24	Deposition of Frank Di Marco, 1/18/66 filed.			
104 " 24	Deposition of Frank DiMarco, 1/17/66 filed.			
105 " 24	Deposition of Frank DiMarco, 1/21/66 filed.			
106 " 24	Deposition of John DiMarco, Jr. 1/21/66 filed.			
107 " 24	Deposition of Frank DiMarco 1/22/66 filed.			
108 " 24	Deposition of John DiMarco, Jr. 1/23/66 filed.			
109 " 24	Deposition of Charles A. Kavaney, 5/5/66 filed.			
110 " 24	Deposition of Charles A. Kavaney, 5/6/66 filed.			
1967				
111 Feb. 14	Deposition of J. DiMarco, filed.			
113 " 14	Continued deposition of J. DiMarco, filed affidavit C.A.			
13 May 22	Motion by piffs. to amend complaint, filed and affidavit			
14 " 22	Piffs. motion for production of documents, filed.			
15 " 22	Piffs. interrogatories to defts., filed.			
16 " 23	Piff's, notice of taking deposition of T. Cunningham, filed.			
17 " 25	Objections of U.S. Gypsum Co., et al to piffs. interrogatories, filed.			
118 Jun 6	Defts. motion to limit the scope of examination or, in the alternative, to stay the taking of the deposition of Thomas Cunningham, filed.			
19 " 7	Order of Court fixing July 6, 1967 at 2:00 p.m. for argument on piffs. motion for production of documents, etc. and fixing time for filing briefs, filed. 6-8-67 entered & copies mailed			ALR
20 Jun 12	Answer to defts. motion to limit the scope of examination or, in the alternative, to stay the taking of the deposition of T. Cunningham, filed.			
121 " 13	Motion for dismissal of Baseball Gypsum, et al, filed.			
122 " 13	Notice of motion for dismissal of Baseball Gypsum, et al, filed.			
123 " 13	Stipulation and Order dismissing action as to Baseball Gypsum Co., et al, filed.			ALR
July 6	Argued sur motion to amend and discovery matters C.A.V.			ALR
24 July 20	Deposition of Thomas B. Cunningham, filed. - TAKEN			
25 Aug. 4	Transcript of July 6, 1967, filed.			
26 Oct. 16	Defts. motion for partial summary judgment, filed.			
127 Oct. 20	Order of Court Granting piffs motion to amend the first amended complaint, and allowing parties to file appropriate motions (9 days) rod. to be argued on 11/10/67 at 3:45 P.M., filed. (10/24/67 entered - copies mailed 10/30/67)			ALR
28 Oct. 24	Piffs' notice of taking depositions of Robert B. Stephen, et al, filed.			
29 " 24	Piffs' notice of taking deposition of Edwin V. Parker, et al, filed.			
130 " 26	Defts' supplemental motion for partial summary judgment, filed.			
131 " 26	Defts' motion to limit discovery, filed.			
37 Nov. 6	Order of Court continuing arguments scheduled for Nov. 10, 1967 until Nov. 21, 1967 at 3:45 p.m., filed. 11-7-67 entered & copies mailed			ALR
33 " 6	Piffs, petition for reargument, filed.			
34 " 6	Affidavit of M. Lashner, Esq., filed.			
35 " 17	Transcript of conference in chambers 10-20-67, filed.			
Nov. 22	Argued sur motions for summary judgment C.A.V.			ALR

DI MARCO VS. UNITED STATES GYPSUM CO., ET AL C.A. 31140 1966

DATE 1968	PLEADINGS-PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	JUDGE'S INITIALS
136 July 5	Order of Court ruling on discovery motions and consolidating this case with C.A. Nos. 39228 and 40029 for trial to a jury, filed. (7/11/68 entered - copies mailed 7/5/68)			ALR
137 " 12	Motion of U. S. Gypsum Co. et al for reargument, filed.			
138 " 2	Order of Court overruling defts. objections to interrogatories with certain exceptions; Granting defts. objections to piffs motion for production of documents with certain exceptions;, filed dated 6-28-68			ALR
139 " 2	Order of Court GRANTING defts. motion for partial summary judgment as to claims of damages, etc.; DENYING defts. motionsfor partial summary judgment, etc.; DENYING piffs. motion for reargument of Order of Oct. 20, 1967, etc., filed			"
140 Aug. 26	Order of Court ruling on motion for reargument of U.S. Gypsum Co. et al sur Orders of Court of June 28, 1968, etc., filed 8-27-68 entered & copies mailed			ALR
141 " 30	Opinion Higginbothom J. sur; defts. motion for partial summary judgment in support of Order of 6-28-68, filed. 9-3-68 entered & notice mailed			
142 Oct. 28	Answers of United States Gypsum Co. to set No. 2 of interrogatories, filed.			
143 Nov. 12	Answers of Natl. Gypsum Co. to piffs, interrogatories, filed			
144 " 13	Additional response to interrogatories addressed to Natl. Gypsum Co., filed.			
145 Nov. 25	Motion of Defts U.S. Gypsum Co. and National Gypsum Co. for a protective order under Rule 26(b), filed.			
146 " 25	Order fixing 12-16-68 at 4:00 P.M. for hearing on defts motion for protective order and any other motions now pending etc., filed. 12-3-68 entered & copies mailed			
147 Dec. 5	Piffs, motion for sanctions, filed.			
1969				
148 Jan. 22	Order of Court fixing Jan. 29, 1969 at 3:30p.m. for hearing on piffs, motion for sanctions and defts. motion for a protective order, filed 1-27-69 entered & copies mailed			ALR
149 Feb. 4	Transcript of 1/29/69, filed.			
150 " 13	Supplemental answers to set No. 3 of interrogatories to U.S. Gypsum Co. by piffs., filed,			
151 " 13	Restated answers to interrogatories to Natl. Gypsum Co. of piffs., filed.			
152 " 27	Protective Order that defts. U.S. Gypsum Co. et al may designate certain confidential documents, etc., filed.			ALR
153 Oct. 6	Order of Court assigning case for trial on Nov. 17, 1969 at 10:00 a.m.; directing parties to appear at a final pretrial conference on Oct. 20, 1969 at 10:00 a.m., filed. 10-7-69 entered & copies mailed			ALR
154 " 16	Appearance of H. F. DeLone, Esq. for Natl. Gypsum Co., filed.			
155 " 24	Transcript of Oct. 20, 1969, filed.			
156 Oct. 30	Appearance of H. H. Scobilonko, Esq. for U.S. Gypsum Co., filed			
157 Nov. 12	Joint motion of defts. for security for costs, filed.			
158 " 17	Notice of U.S. Gypsum Co., et al of taking depositions of F. Greenberg, et al, filed.			
159 " 21	Transcript of Nov. 11, 1969, filed.			
160 Dec. 9	Order DENYING defts. joint motionfor an Order requiring all piffs. except the Receiver to give security for costs without prejudice, filed			ALR

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James Di Marco, et al vs. United States Gypsum Co., et al

DATE 1969	PROCEEDINGS	PLAINTIFF	DEFENDANT	Date Order or Judgment Noted
Dec. 5	Transcript of Nov. 19, 1969, filed.			
" 10	Notice of Kaplan Gypsum Co. et al of taking depositions of S. Rosen, filed			
" 16	Motion of U. S. Gypsum Co. to stay proceedings, filed.			
1970				
Jan. 12	Argued our defts's motion to stay proceedings C.A.V.		ALH	
Jan. 14	Transcript of 1/12/70, filed.			
Jan. 16	Transcript of 12/16/69, filed.			
" 16	Order of Court Granting defts motion to stay proceedings so far as assignment to trial until 5/30/70, etc., discovery to be finished within 30 days, filed. (1/19/70 entered and copies mailed)		ALH	
Feb.12	Piffs request for admissions of U.S. Gypsum Co, and National Gypsum Co., filed.			
" 12	Piffs interrogatories to defts U.S. Gypsum and National Gypsum, filed.			
" 12	Piffs notice of taking deposition of H. F. Radker, filed.			
" 12	Piffs notice of taking deposition of C. N. Shaver, filed.			
" 12	Piffs notice of taking deposition of Fred A. Kunsman, et al, filed.			
" 12	Defts U.S. Gypsum and National Gypsum's summary of testimony of Defts expert economist, filed.			
Feb.13	Piffs notice of taking deposition of Charles K. Berry, filed.			
Mar 9	Deft United States Gypsum Co., objections to piffs' interrogatories, filed.			
" 9	Deft United States Gypsum Co., objections to piffs' requests for admissions, filed.			
" 3	Stipulation and Order extending time for defts to answer piffs' interrogatories, filed			
" 3	Objections and Notice of Deft. National Gypsum Company to Piffs' requests for admission Nos. 1 and 3 , filed.			
Mar.12	Stipulation and Order extending time for National Gypsum Co. to answer piffs interrogatories to defts filed 2/13/70 and piffs request for admissions #2 filed 2/13/70 to 4/1/70, filed.		LH	
Apr.3	Argued our defts objections to piffs request for admissions Nos. 1 and 3 and objection to piffs interrogatories and piffs admissions C.A.V.		"	
May 4	Letter dated 4/13/70 from Melvin Lashner, Esq. to Judge Higginbotham, stating that they oppose Mr. Quigg's motion for stay of proceedings, etc., filed.			
May 7	Transcript of 4/3/70, filed.			
Jun.9	Order of Court ruling on defts discovery motions argued 4/3/70, filed. (6/10/70 entered and copies mailed)		LH	
Jul.8	Answers of U.S. Gypsum Co. to piffs interrogatories, filed.			
" 8	Response of Deft. U.S. Gypsum Co. to piffs' requests for admissions, filed.			
" 20	Response of National Gypsum Co. to piffs. requests for admissions, filed.			
" 20	Answers of National Gypsum Co. to piffs. interrogatories, filed.			
Aug.31	Withdrawal of appearances of Thornell C. Dilks, Esq. and Paul D. Applebaum, Esq. and entry of appearance of Gabriel F. [illegible], Esq. for U.S. Gypsum Co., filed.			

JAMES DI MARCO, et al vs. UNITED STATES GYPSUM CO., et al

U.S. Dist. Ct. and State Courts — PAGE 8 — C.A. 31766

DATE 1972	PROCEEDINGS	Date Order or Judgment Noted
Sept 19	Notice of Dismissal under Local Rule 23-4, filed 9/19/72 entered and Notices mailed	
Sep. 20	Letter dated 9/19/72 to Judge Higginbotham from Melvin Lashner, Esq. asking the Court not to dismiss this case but to set it for trial as soon as possible, filed.	
Sep. 29	Order of Court suspending operation of Rule 23(a) in this case as it is awaiting disposition of partially related cases in Northern District of California, filed. (10/2/72 entered and copies mailed)	LH
190.Sep. 1973	Withdrawal of appearance of Alan H. Kaplan, Esq. as co-counsel for piffs, filed.	
191 Aug.	Order fixing 9-26-73 at 4 P.M. for conference, filed. 8-31-73 entered & copies mailed	LH-Cl.
" 31	Letter to Judge Higginbotham from Benjamin M. Quigg, Jr., Esq. re: Scheduling of a pre-trial conference for sometime after 12/1/73 etc., filed	
Sept 11	Order that conference scheduled for 8/26/73 is POSTPONED until 10/10/73 at 4:15 PM in Rm. 5000, filed. 9/12/73 entered -- copies mailed.	LH-CLERK
" 17	Withdrawal of Appearance of Herman J. Obert, Esq. for Deft. National Gypsum Co., filed.	
Oct 3	Letter dtd 9/13/73 to Higginbotham, J., from Stephen W. Armstrong, Esq., re postponement of pre-trial conference, filed.	
" 11	Pre-Trial Order No. 1, Higginbotham, J., filed. 10/12/73 entered and copies mailed.	LH
Nov 19	Transcript of 11/16/73 (Conference in Chambers), filed.	
" 23	Order that this action is dismissed with prejudice, without costs, filed. 11/26/73 entered and copies mailed.	LH/CLK

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DEFENDANTS' EXHIBIT D-5 D-5

Interrogatory Nos. 18 & 19

(18) With respect to such product, has it come to your attention that any of your employees or executives discussed with employees or executives of any competitors: either customers, territories of sale, bids, prices, terms or conditions of sale or any other competitive information?

(19) If so: (a) state the date of every meeting, conversation, telephone call or other contact, which has come to your attention at which any such discussion took place; (b) identify all correspondence or other documents reflecting or recording any such discussion or any part thereof; (c) identify the individuals who participated in such discussions by name, address and position at the time, present position and present address, stating on whose behalf each was purporting to act; and state (d) where each such discussion took place; (e) the substance of each such discussion and (f) who has possession or custody of each writing referred to in your answer to this interrogatory.

Answer to Interrogatory Nos. 18 & 19

No discussions of the type referred to in Interrogatory Nos. 18 and 19 were had during the period of time covered by these interrogatories by employees or executives of the Company with employees or executives of its competitors, with the exception of isolated instances, all of which can be described as follows: Frequently, a dealer, applicator or contractor will tell a salesman of the Company that a competitor has offered better prices, terms or other conditions of sale than the Company is currently offering. In accord with the

Answer to Interrogatory Nos. 18 & 19 (Contd.)

Company's intention to abide by the antitrust laws, including the Robinson-Patman Act, an investigation is always made of the report of more favorable prices, terms or conditions of sale to determine the accuracy of the report. In many such instances, the information received from the dealer, applicator or contractor leaves no doubt that the competitive offer exists, and no further vertification is needed. In other cases, circumstances may be such that the Company feels that, to protect itself against the possibility that the information received may be untrue or incorrect, it must take further steps to satisfy itself with respect to the existence, and details, of the competitive offer. In cases where this is deemed necessary, the Company attempts to verify the correctness of the information by communicating with everyone having direct or indirect knowledge of the competitive offer. In a few instances, where other attempts to verify the information either fail or produce unsatisfactory results, an employee or executive of the Company will call the competitor who is reported to have made the better offer to check on the reported information. Similarly, competitors will call the Company seeking the same information, presumably for the same reason. To the best of the present recollection of those in the Company having knowledge of such discussions, the following are the details thereof (the letters correspond to the letters used in the Interrogatory):

(a) no dates on which such discussions took place are recalled;

(b) There are no documents in existence which re-

Answer to Interrogatory Nos. 18 & 19 (Contd.)

flect or record such discussions;

(c) Andrew J. Watt, Henry Bear and H. F. Sadler participated in such discussions, and are identified in the answer to Interrogatory Nos. 5 or 25 and each was acting on behalf of the Company.

(d) each such discussion took place over the telephone or in person;

(e) neither Mr. Watt nor Mr. Bear nor Mr. Sadler can recall the specific matters discussed on any specific occasion, other than the fact that each discussion was limited to an inquiry regarding whether or not the competitor (or the Company if the call was made by a competitor) had previously sold or offered to sell in a particular market or to a particular customer at a named price.

(f) no answer required.

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DEFENDANTS' EXHIBIT D-6

6.(a) Not applicable.

(b) Not applicable.

7. See certificates returned.

8. See certificates returned.

9. Yes.

10.(a) Yes.

(b) Memorandum from Finch & Tudor dated November 6, 1956.

(c) K. H. Atwell

11. No.

12. Not applicable.

13. Not applicable.

14. Not applicable.

15. No.

16. Not applicable.

17. Not applicable.

18. Yes.

19.(a) No dates can be recalled.

(b) and (f) There are no such documents.

(c) and (e) No specific discussions can be recalled nor are the specific surnames of any such conversations to be recalled other than occasionally surnames or initials of persons forming which will or be called to verify that a competitive price quote had or offered to sell the product at a specific price to a customer on a particular product. No specific persons can be identified as having had any particular discussion. Such communications would have been infrequent and in no way violative of our antitrust laws and were made to insure consistency with the Robinson-Patman Act.

(d) Any discussion either took place on the telephone or in person.

20. See answer to No. 20 attached hereto consisting of eleven (11) pages. Without further survey has a study of all price sheets. The affirmative cases of the sale claims all items on the current published price sheet each item as advertised would the lowest or the minimum or contemporaneous price.

21. There are no formula or document other than stated as the result of which [illegible] is applied to all [illegible] the [illegible] price sheets.

22. See certificates returned.

23. See certificates returned.

24. See certificates returned.

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DEFENDANTS' EXHIBIT D-13

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

TERRY SUPPLY CO., INC.	:	CIVIL ACTION
vs.	:	
UNITED STATES GYPSUM COMPANY and NATIONAL GYPSUM COMPANY	:	NO. 3495

COMPLAINT IN ANTI-TRUST

1. This complaint is filed and these proceedings are instituted under Sections I and II of the Sherman Act, the Clayton Act and Robinson-Patman Act to recover treble damages and the costs of suit including a reasonable attorney's fee against the defendants for injury sustained by plaintiff as a result of defendants violation of the aforementioned Acts of Congress.

2. The plaintiff is Terry Supply Co., Inc., a Pennsylvania corporation, engaged in the business of supplying building materials with a main office and principal place of business located at 357 W. Street Road, Warminster, Pennsylvania.

3. The defendants are United States Gypsum Company, the prime supplier of gypsum board in the United States, and National Gypsum Company, the second largest supplier of gypsum board in the United States.

4. The Acts alleged in this complaint to have been committed by each of the defendants were authorized, ordered or done by officers, agents, representatives, or employees of such defendants while actively engaged in the management, direction and control of the affairs of said defendant corporations.

5. Plaintiff and defendants herein are engaged in trade and commerce in or directly affecting interstate commerce.

6. Beginning as early as 1936 the defendants had engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of the Acts of Congress enumerated in paragraph #1 of this complaint.

7. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants, the substantial terms of which have been and are:

(a) To fix and maintain prices, terms and conditions for the purchase of gypsum board and allied building materials.

(b) To allocate among themselves the business of supplying said gypsum board in certain areas.

(c) To submit non-competitive prices for gypsum board and allied building materials to purchasing wholesalers who are thereupon denied the opportunity to negotiate prices with manufacturers.

(d) To refrain individually and in concert from the sale of gypsum board and allied building materials to certain wholesalers, one of which was plaintiff.

(e) To raise and maintain the price of gypsum board and allied building materials to wholesalers and retailers.

(f) To maintain wholesale and retail prices by directing retail customers to favored wholesalers and restricting

the supply of gypsum board and other building products to plaintiff.

8. During the period of such conspiracy the defendants separately and individually and in addition thereto for the purpose of forming and effectuating the aforesaid combination and conspiracy have committed or taken part in the following:

(a) For a number of years through and including 1945 representatives of each of the defendants have agreed on the terms and conditions of sale including the fixing of prices among all of said manufacturers.

(b) Have maintained prices for gypsum board in spite of transportation differentials which would militate against such price maintenance.

(c) Have established United States Gypsum Company in the Philadelphia area as the price maintenance leader and have adopted by agreement the price of United States Gypsum, which price is rigidly maintained no matter where the goods are shipped within the aforementioned areas.

(d) Have refused to sell gypsum board and allied products to plaintiff when said plaintiff refused to agree to:

(1) purchase products at the insistence of defendants under tie-in sales arrangements, such tied-in products being in many instances available at lower prices on the open market;

(2) maintain their retail prices at levels suggested by said defendants; and,

(3) sell gypsum board to purchasers that defendants produced, many of whom ultimately failed to pay for said board.

9. Defendants have continually held meetings thereafter either in a group or separately whereby prices were maintained, allocation of wholesalers discussed, and action jointly agreed upon to enforce the aforesaid retail price maintenance.

10. The above arrangements and understandings necessitated frequent oral and written communications between representatives of defendant manufacturers, and in the course of such communications various procedures were adopted for the purpose of avoiding detection of the same.

11. The effect of the aforesaid combinations and conspiracies have been and are that:

(a) Prices of gypsum board throughout the United States and Philadelphia, in particular, have been raised and maintained at levels higher than the price that would have been determined in a free competitive market.

(b) Price competition in the sale of gypsum board throughout the United States and Philadelphia, in particular, has been restrained, suppressed and eliminated.

(c) Purchasers of gypsum board (and in particular the plaintiff) in the United States have been deprived of the benefit of price competition (i.e., lower prices) in the purchase of said gypsum board and allied building materials.

(d) Those wholesalers, one of which was plaintiff, who refused or were unable to adhere to defendants' requirements

terms and conditions for the purchase of gypsum board in the Philadelphia area, suffered substantial and personal loss of customers, sales and profits, and in addition thereto suffered significant declines in the value of their business.

13. Defendant, National Gypsum Company, without reasonable cause and probably with intent to injure plaintiff sent to a national credit bureau and/or agency or other suppliers of building materials an untrue report concerning plaintiff's credit and financial position and its willingness and ability to pay its bills.

13. As a result of such report plaintiff was injured such that:

(a) Other sellers of gypsum board and other building material manufacturers refused to sell such products to plaintiff.

(b) Other sellers of building supplies required stricter payment terms than would have been required had no report been sent.

(c) Plaintiff's standing in the trade was substantially injured, to wit:

(1) plaintiff lost potential and present purchasers of gypsum and other products;

(2) sales of all building products were curtailed; and,

(3) the profits of plaintiff were substantially decreased as a result of the sending of such reports.

14. During the period plaintiff was in business, plaintiff purchased gypsum board in an amount in excess of one million dollars.

15. By reason of defendants' conspiracy hereinabove alleged plaintiff was forced to purchase gypsum board at prices higher than the market or fair prices which said plaintiff, would have had to pay under natural conditions of competition and said plaintiff was forced to sell gypsum board at prices lower than it would have charged, had not the conspiracy been in effect resulting in the subsequent insolvency of plaintiff much to the damage and loss of the plaintiff herein. Plaintiff is unable to state the damages with precision at the present time since the determination will require discovery of an analysis of an accounting from defendants' books and records.

WHEREFORE, plaintiff requests that judgment be entered in its favor in threefold the amount of the damages determined to have been sustained by plaintiff together with costs of suit including a reasonable attorneys fee.

ADELMAN & LAVINE, Esquires

By _____
Attorney for Plaintiff

JURY TRIAL DEMANDED

DEFENDANTS' EXHIBIT D-15

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

NICHOLAS J. MONGIELLO, INC. : CIVIL ACTION
:
vs. :
:
UNITED STATES GYPSUM COMPANY :
and NATIONAL GYPSUM COMPANY : NO. 40029

COMPLAINT IN ANTI-TRUST

1. This complaint is filed and these proceedings are instituted under Sections I and II of the Sherman Act, the Clayton Act and the Robinson-Patman Act to recover treble damages and the costs of suit including a reasonable attorney's fee against the defendants for injury sustained by plaintiff as a result of defendants' violation of the aforementioned Acts of Congress.

2. The plaintiff is Nicholas J. Mongiello, Inc., a Pennsylvania corporation, engaged in the business of supplying building materials with a main office and principal place of business located at 333 North 61st Street, Philadelphia, Pennsylvania.

3. The defendants are United States Gypsum Company, the prime supplier of gypsum board in the United States, and National Gypsum Company, the second largest supplier of gypsum board in the United States.

4. The acts alleged in this complaint to have been committed by each of the defendants were authorized, ordered or done by officers, agents, representatives, or employees of such defendants while actively engaged in the management, direction and control of the affairs of said defendant corporations.

5. Plaintiff and defendants herein are engaged in trade and commerce in or directly affecting interstate commerce.

6. Beginning as early as 1930, the defendants had engaged in a combination and conspiracy in unreasonable restraint of trade and commerce in violation of the Acts of Congress enumerated in paragraph 01 of this complaint.

7. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants, the substantial terms of which have been and are:

(a) To fix and maintain prices, terms and conditions for the purchase of lath, plaster products, gypsum board, and allied building materials.

(b) To allocate among themselves the business of supplying the above in certain areas.

(c) To submit non-competitive prices for lath, plaster products, gypsum board, and allied building materials to purchasing wholesalers who are thereupon denied the opportunity to negotiate prices with manufacturers.

(d) To refrain individually and in concert from the sale of lath, plaster products, gypsum board, and allied building materials to certain wholesalers, one of which is plaintiff.

(e) To raise and maintain the price of lath, plaster products, gypsum board, and allied building materials to wholesalers and retailers.

(f) To maintain wholesale and retail prices by directing retail customers to favored wholesalers and restricting the supply of lath, plaster products, gypsum board, and allied building materials to plaintiff.

8. During the period of such conspiracy the defendants separately and individually and in addition thereto for the purpose of forming and effectuating the aforesaid combination and conspiracy have committed or taken part in the following:

(a) For a number of years through and including 1946 representatives of each of the defendants have agreed on the terms and conditions of sale including the fixing of prices among all of said manufacturers.

(b) Have maintained prices for lath, plaster products, gypsum board, and allied building materials in spite of transportation differentials which would militate against such price maintenance.

(c) Have established United States Gypsum Company in the Philadelphia area as the price maintenance leader and have adopted by agreement the price of United States Gypsum which price is rigidly maintained no matter where the goods are shipped within the aforementioned areas.

(d) Have sent salesmen to the customers and potential customers of the plaintiff, which salesmen have induced plaintiff's customers to refuse compliance with the defendants in that defendants controlled sales of lath, plaster products, gypsum board and allied building materials as to price, quantity and source of said materials.

(e) Have refused to sell lath, plaster products, gypsum board and allied building materials to plaintiff when said plaintiff refused to agree to:

(1) purchase products at the insistence of defendants under tie-in sales arrangements, such tied-in products being in many instances available at lower prices on the open market; and,

(2) maintain their retail prices at levels suggested by said defendants.

9. The above arrangements and understandings necessitated frequent oral and written communications between representatives of defendant manufacturers, and in the course of such communications various procedures were adopted for the purpose of avoiding detection of the same.

10. The effect of the aforesaid combinations and conspiracies have been and are that:

(a) Prices of lath, plaster products, gypsum board and allied building materials throughout the United States and Philadelphia in particular, have been raised and maintained at levels higher than the price that would have been determined in a free competitive market;

(b) Price competition in the sale of lath, plaster products, gypsum board and allied building materials throughout the United States and Philadelphia in particular, has been restrained, suppressed and eliminated;

(c) Purchasers of lath, plaster products, gypsum board and allied building materials (and in particular the

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plaintiff) in the United States have been deprived of the benefit of price competition (i.e., lower prices) in the purchase of said lath, plaster products, gypsum board and allied building materials; and,

(d) Those wholesalers one of which was the plaintiff who refused or were unable to adhere to defendants' requirements, terms and conditions for the purchase of lath, plaster products, gypsum board and allied building materials in the Philadelphia area, suffered substantial and personal loss of customers, sales and profits, and in addition thereto suffered significant declines in the value of their business.

11. During the period concluding with December 31, 1965 plaintiff purchased lath, plaster products, gypsum board and allied building materials in an amount in excess of One Million Dollars.

12. By reason of defendants' conspiracy hereinabove alleged plaintiff was forced to purchase lath, plaster products, gypsum board and allied building materials at prices higher than the market or fair prices which said plaintiff would have had to pay under natural conditions of competition and said plaintiff was forced to sell lth, plaster products, gypsum board and allied building materials at prices lower than they would have charged, had not the conspiracy been in effect much to the damage and loss of the plaintiff herein. Plaintiff is unable to state the damages with precision at the present time since the determination will require discovery of an analysis of an accounting from defendants' books and records.

WHEREFORE, plaintiff requests that judgment be entered in its favor in threefold the amount of the damages determined to have been sustained by plaintiff together with costs of suit including a reasonable attorney's fee.

ADELSON & LAVINE, Esqs.

By _____
Attorney for Plaintiff

JURY TRIAL DEMANDED

DEFENDANTS' EXHIBIT G-2.

FREDERICK P. FURTH
Russ Building, Suite 666
235 Montgomery Street
San Francisco, California
Telephone: 433-2070
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CIVIL NO.

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF UNDER ANTITRUST LAWS AND CONTRACT
(JURY DEMANDED)

WALL PRODUCTS CO., a California corporation; Richard L. Downing and Lura M. Downing,
Plaintiffs,

vs.

NATIONAL GYPSUM COMPANY, a Delaware corporation,
Defendant.

Plaintiffs for their complaint herein against the above named defendant, demanding a trial by jury, respectfully allege as follows:

FIRST CLAIM.

I.

NATURE OF CLAIM AND JURISDICTION OF COURT.

1. This complaint is filed and this action instituted against defendant under Sections 4, 12 and 16 of the

Clayton Act (15 U. S. C. §§ 15, 22 and 26 (1963)) in order to declare, to prevent and restrain and to recover damages resulting from the violation by defendant, as hereinafter alleged, of Section 1 of the Sherman Act (15 U. S. C. § 1 (1963)), of Section 2 of the Sherman Act (15 U. S. C. § 2 (1963)), of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (15 U. S. C. § 13 (1963)) and of § 3 of the Clayton Act (15 U. S. C. § 14 (1963)).

II.

DESCRIPTION OF PARTIES.

2. Plaintiff Wall Products Co. ("Wall Products"), doing business as Delta Supply, is a corporation organized and existing under the laws of the State of California with its principal place of business located at Ben Lomond, California. Wall Products was engaged in the selling of building materials and supplies, principally Gypsum Wallboard and related products.

3. Plaintiffs Richard L. Downing and Lura M. Downing are residents of the State of California, and at all times mentioned herein were directors, officers and shareholders of Wall Products.

4. Defendant National Gypsum Company ("National") is a corporation organized and existing under the laws of the State of Delaware and transacts and is qualified to do business within the State of California. It was and is, at all times material hereto, engaged in interstate and foreign commerce in the production, distribution and sale of, among other products, Gypsum Wallboard and related products.

5. United States Gypsum Company ("U. S. G.") and Fibreboard Corporation ("Pabco") are named herein as

co-conspirators but not defendants. U. S. G., Pabco and other gypsum manufacturers not named are hereinafter collectively referred to as "Co-conspirators". U. S. G. and Pabco were organized and exist under the laws of the States of Illinois and Delaware, respectively. Each of the Co-conspirators was and is, at all times material hereto, engaged in interstate and foreign commerce in the production, distribution and sale of, among other products, Gypsum Wallboard and related products.

III.

Commerce Involved.

6. In the manufacture of gypsum wallboard ("Gypsum Wallboard") raw gypsum is crushed and processed with additives to form a liquid solution which is placed in an envelope of tough paper and thereafter placed in dryers. The finished product consists of a strong, resilient core of gypsum securely bonded within an envelope of tough paper. Gypsum Wallboard is available in a wide variety of sizes and types and serves a variety of architectural and structural uses. Gypsum Wallboard is given different trade names by different manufacturers, but such trade names usually include the term gypsum wallboard. Related products to Gypsum Wallboard include gypsum plaster, gypsum lath which is used as the base upon which gypsum plaster is applied, joint cement and other finishing products, hard and soft board which are compressed wood fibre products, and insulation materials.

7. Defendant National and Co-conspirators are known in the trade as manufacturers of Gypsum Wallboard and related products. In the Gypsum Wallboard industry, during 1965, Defendant National and U. S. G. and Pabco sold approximately sixty (60) per cent of the Gypsum

Wallboard used in the United States. In 1965 their approximate share of the relevant California market was as follows:

National	26%
U. S. G.	30%
Pabco	8%

8. Wall Products is known in the trade as a distributor of Gypsum Wallboard and related products. Between July, 1963 and August, 1966, Wall Products was one of the several distributors of these products in California. Defendant National and Co-conspirators supplied Wall Products and other distributors in California and Nevada with Gypsum Wallboard and related products which were shipped by Defendant National and Co-conspirators from inside and outside the States of California and Nevada to Wall Products and other distributors in California. Wall Products sold Gypsum Wallboard and related products principally to building contractors and sub-contractors within the States of California and Nevada. During the calendar year 1965, the total sales of such products by Wall Products amounted to approximately Two Million ($2,000,000) dollars.

IV.

Offenses Charged.

9. Beginning at least in 1955, and continuing up to the date of the filing of this complaint, Defendant National and Co-conspirators and other persons acting for each of them have, jointly and severally, engaged in:

(a) A continuing combination and conspiracy to restrain interstate and foreign commerce of the United States in Gypsum Wallboard and related products in violation of Section 1 of the Sherman Act;

(b) A combination and conspiracy to monopolize and a combination and conspiracy to attempt to monopolize interstate and foreign commerce of the United States in Gypsum Wallboard and related products in violation of Section 2 of the Sherman Act;

(c) An attempt to monopolize and pursuant thereto have in fact achieved monopoly of interstate and foreign commerce of the United States in Gypsum Wallboard and related products in violation of Section 2 of the Sherman Act; and

(d) Discrimination in price, terms, allowances, services, and facilities in connection with the production, distribution and sale of Gypsum Wallboard and related products in interstate and foreign commerce of the United States in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

(e) Sales and contracts for sale of Gypsum Wallboard and related products and price fixing, discounts and rebates in violation of Section 3 of the Clayton Act.

10. Each act of Defendant National and Co-conspirators hereinafter alleged was done in furtherance of the offenses charged in the preceding paragraph and was a part thereof and was done with the primary purpose of and intent of restraining, monopolizing, attempting to monopolize and substantially lessening competition in the trade and commerce described herein. It was the intent, jointly and severally, of Defendant National and Co-conspirators, *inter alia*, to:

(a) Eliminate competition in the production, distribution and sale of Gypsum Wallboard and related products;

(b) Fix and stabilize prices, credit terms, cash discounts, terms of payment, time of payment and other

terms and conditions of sale for Gypsum Wallboard and related products at non-competitive levels, allocate sales, and divide markets;

(c) Use their monopoly position in the production, distribution and sale of Gypsum Wallboard and related products, to eliminate competition;

(d) Discriminate against Wall Products and in favor of distributors in competition with Wall Products with regard to prices, credit terms, cash discounts, terms of payment, time of payment and other terms and conditions at which Gypsum Wallboard and related products were sold by control over said items;

(e) Impose coercive and restrictive economic and credit pressures upon Plaintiffs to control Plaintiffs and to eliminate competition in the terms and conditions of such purchases and of the resale by Wall Products of these products or to force Plaintiffs out of business;

(f) Refuse Wall Products credit terms, cash discount terms of payment, time of payment, and other terms and conditions of sale on purchases of Gypsum Wallboard and related products while allowing them to other distributors in competition with Wall Products;

(g) Control Plaintiffs or force them out of business by joint fixing and adoption of prices, credit terms, cash discounts, terms of payments, time of payment and other terms and conditions of sale;

(h) Restrict the geographical area within which Wall Products was permitted to sell Gypsum Wallboard and related products to eliminate competition and fix prices and the terms and conditions of sale of such products;

(i) Make sales and contracts for sale of Gypsum Wallboard and related products and fix prices and give discounts and rebates from such prices on the condition, agreement and understanding that the purchaser thereof would not deal in the products of a competitor of the seller;

(j) Eliminate Wall Products as a distributor of Gypsum Wallboard and related products; and

(k) Obtain substantial profits for themselves, at the expense of Plaintiffs, as a result of the restrictions upon competition in the trade and commerce hereinbefore alleged.

V.

Acts of Defendant and Co-conspirators.

11. Commencing on or about 1955, the exact date being unknown to Plaintiffs, and continuing from that time until the present, Defendant National and Co-conspirators combined and conspired to fix prices, credit terms, cash discounts, terms of payment, time of payment and other terms and conditions of sale, and did fix prices, credit terms, cash discounts, terms of payment, time of payment and other terms and conditions of sale at which they sold Gypsum Wallboard and related products. In furtherance of their combination and conspiracy, Defendant National and Co-conspirators also allocated and divided markets limited the means of shipment to rail only, fixed and maintained other terms and conditions of sales to Wall Products and other distributors, as well as the terms and conditions upon which Gypsum Wallboard and related products were sold by Wall Products and other distributors.

12. In July, 1954 Plaintiff Richard L. Downing commenced work for a major gypsum wallboard manufacturer

as District Credit Manager. In June, 1962, he was promoted to General Credit Manager which position he held until July, 1963 when he resigned from the company. Thereafter, he commenced the business of Wall Products Co., a California corporation, doing business as Delta Supply, as a distributor of Gypsum Wallboard and related products with its principal place of business in Union City, California. In its first month of operation Wall Products had sales in excess of $80,000.00 and rapidly became one of the largest distributors of Gypsum Wallboard and related products in its area.

13. Wall Products purchased substantial quantities of Gypsum Wallboard and related products from Defendant National and Co-conspirators. From July, 1963 until April, 1964 Defendant National shipped the majority of its products purchased by Wall Products from its gypsum production plants in Rotan, Texas, and Phoenix, Arizona. Subsequent to April, 1964 Defendant National shipped the majority of such products from a then newly-opened plant in Richmond, California. U. S. G. and Pabco shipped the products purchased by Wall Products from plants in Utah and Nevada, respectively, as well as California.

14. As the business of Wall Products increased, branches were opened in Martinez, California in August, 1964 and Vallejo, California in April, 1965. In January, 1966 a branch of Wall Products was opened in Reno, Nevada and in February, 1966 the principal place of business was moved seven miles from Union City, California to Fremont, California. The principal marketing area served by Wall Products was central California and the northern one-half of the State of Nevada.

15. Wall Products purchased Gypsum Wallboard and related products at prices and terms based upon list prices and terms published by Defendant National and Co-con-

spirators. On or about November 18, 1965, Plaintiffs were told "off the record" that Defendant National and Co-conspirators were taking joint action to eliminate all price deviations during December, 1965 and that the price at which Gypsum Wallboard and related products was to be sold would be the list price. Thereafter Defendant National and Co-conspirators did eliminate all price deviations on December 15, 1965, and the price of Gypsum Wallboard has remained fixed without price deviation up to the present time.

16. In purchasing Gypsum Wallboard and related products from Defendant National and Co-conspirators, Wall Products was granted credit terms, cash discounts, terms of payment, time of payment and other terms and conditions of sale on the basis of a fixed policy among Defendant National and Co-conspirators. During most of the period from July, 1963 until March 1, 1966, the terms granted to distributors by Defendant National and Co-conspirators were stated to be "2% 20th Prox." but in practice were substantially different. In practice, an extension of the time for payment was allowed within which the 2% cash discount could be taken. This extension of the cash discount period ranged between an additional thirty days and sixty days.

17. Also on or about November 18, 1965, Plaintiffs were told "off the record" that Defendant National and Co-conspirators had agreed to fix credit terms by eliminating any credit extensions for the time of payment beyond uniform stated terms, by eliminating the additional periods then in existence for the allowance of cash discounts and by otherwise fixing the terms of payment, time of payment and other terms and conditions of sale of Gypsum Wallboard and related products. In agreeing to eliminate the credit extensions beyond uniform stated terms, Defendant

National and Co-conspirators took away from Plaintiffs and other distributors their working capital upon which they relied thereby forcing Plaintiffs out of business. In eliminating the additional period of the allowance for cash discount, Defendant National and Co-conspirators agreed to raise the price of such products by 2%. All sales to distributors would then be on a "2% 20th Prox. Net Following 10th" basis. Such terms meant that no cash discount could be taken for payment after the 20th of the month following the month of billing and that no account could remain unpaid, even without the deduction of the 2% cash discount, past the 10th of the second month following billing.

18. In late January and early February, 1966, Plaintiffs received separate letters from Defendant National and Co-conspirators, adopting identical credit terms, cash discounts, terms of payment, time of payment and other terms and conditions of sale, all to be effective as of March 1, 1966. As a result of the actions of Defendant National and Co-conspirators, Wall Products was unable to finance additional purchases of Gypsum Wallboard and related products and, as a result, Wall Products was forced out of business. Also forced out of business were customers of Wall Products thereby preventing Wall Products from collecting debts owed by such customers.

VI.

Effects of Offenses.

19. The intended and actual effects of the offenses heretofore alleged were and have been that Defendant and Co-conspirators:

(a) Monopolized and attempted to monopolize the production, distribution and sale of Gypsum Wallboard and related products;

(b) Restrained competition among Defendant National and Co-conspirators in the production, distribution and sale of Gypsum Wallboard and related products;

(c) Fixed prices, credit terms, cash discounts, terms of payment, time of payment and other terms and conditions of sale of Gypsum Wallboard and related products at non-competitive levels;

(d) Eliminated existing competition and discouraged new competition in the production, distribution and sale of Gypsum Wallboard and related products;

(e) Denied to the public generally and to Plaintiffs specifically the benefits of free competition in the Gypsum Wallboard and related products market; and

(f) Proximately damaged Plaintiffs in their business and property through, *inter alia:* 1) loss of profits due to purchases of Gypsum Wallboard and related products at fixed, non-competitive and discriminatory prices, credit terms, cash discounts, terms of payment, time of payment, and other terms and conditions of sale; 2) loss of profits due to lost sales; 3) destruction of the business, goodwill and other intangible assets of the business; 4) loss of profits and injury to property represented by the diminution in value of Wall Products' accounts receivable from customers who were forced out of business; and 5) losses resulting from being forced to operate the business under economic coercion and duress.

WHEREFORE, Plaintiffs pray that this Court order, adjudge and decree:

A. That Defendant National has violated Sections 1 and 2 of the Sherman Act, Section 2 of the Clayton Act as amended by the Robinson-Patman Act, and Section 3 of the Clayton Act.

B. That Defendant National, its officers, agents, servants, employees, attorneys and all persons in active concert or participation with them who receive actual notice of this injunction be during the pendency of this suit and thereafter enjoined from fixing with Co-conspirators the prices, credit terms, cash discounts, terms of payment and other terms and conditions of sale of Gypsum Wallboard and related products.

C. That Plaintiffs be awarded One Million ($1,000,000) dollars as damages, and that Defendant National pay to Plaintiffs Three Million ($3,000,000) dollars, threefold the damages sustained by Plaintiffs, as provided by law, together with costs and attorneys' fees.

D. That Plaintiffs have such other and further relief as to this Court may seem just and proper.

SECOND CLAIM.

I.

JURISDICTION OF COURT.

20. Plaintiffs' claim arises out of the facts previously alleged in support of the claims hereinbefore stated, and this Court has jurisdiction to grant all relief available under such facts since this Court has jurisdiction, as hereinbefore alleged in Paragraph 1, to determine the claim hereinafter stated and arising out of the facts alleged.

II.

PARTIES AND COMMERCE.

21. Plaintiffs incorporate herein by reference and make a part hereof for all purposes, paragraphs 2 through 8 of the FIRST CLAIM herein.

III.

OFFENSES CHARGED.

22. Beginning at least in 1955, and continuing up to the date of the filing of this complaint, Defendant National and Co-conspirators and other persons acting for each of them have, jointly and severally, engaged in:

(a) Contracts restraining the engaging in trade or business in violation of Section 16600, *et seq.* of the Business and Professions Code of the State of California;

(b) Trusts, contracts, combinations and conspiracies in violation of Section 16720 *et seq.* of the Business and Professions Code of the State of California; and

(c) Unfair trade practices in violation of Section 17000, *et seq.* of the Business and Professions Code of the State of California.

Plaintiffs incorporate herein by reference and make a part hereof for all purposes, Paragraph 10 of the FIRST CLAIM herein.

IV.

ACTS OF DEFENDANT AND CO-CONSPIRATORS.

23. Plaintiffs incorporate herein by reference and make a part hereof for all purposes, Paragraphs 11 to 18 of the FIRST CLAIM herein.

V.

EFFECTS OF OFFENSES.

24. Plaintiffs incorporate herein by reference and make a part hereof for all purposes, Paragraph 19 of the FIRST CLAIM herein.

WHEREFORE, Plaintiffs pray that this Court order, adjudge and decree:

A. That Defendant National has violated Sections 16600 *et seq.*, 16720 *et seq.*, and 17000 *et seq.* of the Business and Professions Code of the State of California.

B. That Plaintiff be awarded One Million ($1,000,000) dollars as damages, and that Defendant National pay to Plaintiffs Three Million ($3,000,000) dollars, threefold the damages sustained by Plaintiffs, as provided by law, together with costs and attorneys' fees.

C. That Plaintiffs have such other and further relief as to this Court may seem just and proper.

THIRD CLAIM.

25. Plaintiffs' claim arises out of the facts previously alleged in support of the claims hereinbefore stated, and this Court has jurisdiction to grant all relief available under such facts since this Court has jurisdiction, as hereinbefore alleged in Paragraph 1, to determine the claims hereinafter stated and arising out of the facts alleged.

26. On or about September 17, 1964, Wall Products and Defendant National entered into a written agreement (herein called "the Agreement") a copy of which is attached to this complaint as Appendix A and incorporated herein by reference.

27. Wall Products duly performed all the conditions on its part to be performed under the terms of the agreement.

28. Defendant National failed to perform and breached the agreement in that:

(a) Defendant National demands, and continues to demand that Wall Products make payment on the debt

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incurred by Wall Products in selling to M & M Construction Co., Inc., prior to the time when such company has paid Wall Products;

(b) Defendant National refused to sell Gypsum Wallboard and related products to Wall Products except on a cash in advance basis as of July, 1966;

29. Defendant National's breach of the agreement proximately caused injury to Wall Products in the approximate amount of Five Hundred Thousand ($500,000) dollars.

WHEREFORE, Plaintiffs pray that this Court order, adjudge and decree:

A. That Plaintiffs be awarded damages in the amount of Five Hundred Thousand ($500,000) dollars plus interest; and

B. That Plaintiffs have such other and further relief as to this Court may seem just and proper.

Dated: January 24, 1967.

Frederick P. Furth,
/s/ FREDERICK P. FURTH,
Attorney for Plaintiffs.

Of Counsel:
Robert L. Bluemle
607 Financial Center
3443 No. Central Avenue
Phoenix, Arizona 85012

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Appendix A.

DELTA SUPPLY
Railroad and "D" St., Union City, California

P. O. Box 585
Phone 471-2584

September 17, 1964

National Gypsum Co.
1040 Canal Blvd.
Richmond, California

Gentlemen:

In consideration of the extension of credit by National Gypsum Co. (here-in-after referred to as National) to Wall Products Co. dba Delta Supply (here-in-after referred to as Delta) for the account of M & M Construction Co. Inc. (here-in-after referred to as M & M), Delta agrees to comply with the following:

1. Delta will sell to M & M on terms that shall not exceed 3rd 20th Prox. In the event M & M fails to pay within these maximum terms of sale, Delta will immediately stop all sales and shipments of all products to M & M.

2. Delta will identify orders as placed for M & M in order that National can maintain a separate ledger account for M & M purchases.

3. Delta will obtain an assignment of the accounts receivable of M & M, past present and future, and will reassign these receivables to National.

4. Payments will be made by Delta to National as and when received from M & M.

5. Delta will permit the inspection by National of all records pertaining to the account of M & M whenever requested by National.

In consideration of the foregoing, National has agreed to carry an account balance with Delta for a dollar amount equal to the amount Delta carries with M & M on terms not exceeding 90 days. This account balance is to be separate and distinct from balances resulting from sales by Delta to customers other than M & M.

Very truly yours,

/s/ RICHARD L. DOWNING
Richard L. Downing, Pres.
WALL PRODUCTS CO.
dba DELTA SUPPLY

Acknowledged
September 22, 1964

/s/ STANLEY EDISON
Stanley Edison, Credit Manager
National Gypsum Co.

Pages 1971–2240 of the Appendix have been omitted

TRIAL EXHIBITS

61-7

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
v.	:	Criminal No. 73-347
UNITED STATES GYPSUM CO., ET AL.,	:	
Defendants.	:	

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the United States of America, by its attorneys, and United States Gypsum Company; National Gypsum Company; Georgia-Pacific Corporation; The Celotex Corporation; Andrew J. Watt; Colon Brown; and J. P. Nicely, defendants in the above-entitled action, by their respective counsel and individually, for the purpose of this action only, but without stipulation as to relevancy, materiality or admissibility, as follows:

1. The term "gypsum board" as used herein means the gypsum board machine products manufactured and sold by the defendant corporations listed above and others.

2. Bestwall Gypsum Company was acquired by Georgia-Pacific Corporation from Certain-Teed Products Corporation on April 28, 1965.

3. During the periods listed below, the defendant corporations named below were organized and existed under the

laws of the state, and had their principal place of business in the city indicated:

Company	State of Incorporation	Principal Place of Business
United States Gypsum Company	Illinois January 1, 1960 to June 30, 1966	Chicago, Illinois January 1, 1960 to December 27, 1973
	Delaware June 30, 1966 to December 27, 1973	
National Gypsum Company	Delaware January 1, 1960 to December 27, 1973	Buffalo, New York January 1, 1960 to December 27, 1973
Georgia-Pacific Corporation	Georgia January 1, 1960 to December 27, 1973	Portland, Oregon January 1, 1960 to December 27, 1973
The Celotex Corporation	Delaware August 6, 1964 to December 27, 1973	Chicago, Illinois August 6, 1964 to July, 1965
		Tampa, Florida July, 1965 to December 27, 1973

4. From 1960 through December 27, 1973, United States Gypsum Company, National Gypsum Company and others were engaged in the manufacture and sale of gypsum board, and other products, in various states of the United States.

5. From May, 1965 through December 27, 1973, Georgia-Pacific Corporation was engaged in the manufacture and sale of

gypsum board, and other products, in various states of the United States.

6. From 1960 through August 31, 1964, The Celotex Corporation, a Delaware corporation, was engaged in the manufacture and sale of gypsum board, and other products, in various states of the United States. On August 6, 1964, a new Delaware corporation was organized under the name The Celotex Company. This corporation is one of the defendants herein. On August 31, 1964,

(a) The Celotex Corporation transferred all of its assets to The Celotex Company;

(b) The Celotex Corporation ceased to exist; and

(c) The Celotex Company changed its name to The Celotex Corporation.

From September 1, 1964 through December 27, 1973, defendant The Celotex Corporation was engaged in the manufacture and sale of gypsum board, and other products, in various states of the United States.

7. From 1960 through December 27, 1973, United States Gypsum Company, National Gypsum Company and others shipped substantial quantities of gypsum board from manufacturing plants located in certain states to customers located in other states, including the Western District of Pennsylvania.

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8. From May, 1965 through December 27, 1973, Georgia-Pacific Corporation shipped substantial quantities of gypsum board from manufacturing plants located in certain states to customers located in other states, including the Western District of Pennsylvania.

9. From September 1, 1964 through December 27, 1973, The Celotex Corporation shipped substantial quantities of gypsum board from manufacturing plants located in certain states to customers located in other states, including the Western District of Pennsylvania.

10. From 1960 through December 27, 1973, substantial quantities of ingredients of gypsum board have been shipped from certain states into other states where they were used by United States Gypsum Company, National Gypsum Company and others in the manufacture of gypsum board.

11. From May, 1965 through December 27, 1973, substantial quantities of ingredients of gypsum board have been shipped from certain states into other states where they were used by Georgia-Pacific Corporation in the manufacture of gypsum board.

12. From September 1, 1964 through December 27, 1973, substantial quantities of ingredients of gypsum board have been shipped from certain states into other states where they were used by The Celotex Corporation in the manufacture of gypsum board.

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SCHEDULE A

TITLES AND TENURES

United States Gypsum Company

A. Victor Abnee

Date	Department	Position
Jan. 1, 1960 to Oct. 31, 1960	Promotion & Advertising	Manager Sales Promotion
Nov. 1, 1960 to Jan. 15, 1961	Advertising	General Manager
Jan. 16, 1961 to Sept. 30, 1962	Promotion & Advertising	Manager - Promotion & Advertising
Oct. 1, 1962 to Mar. 17, 1963	Sales Promotion	Manager Sales Promotion
Mar. 18, 1963 to July 31, 1963	Sales Promotion	Regional Sales Promotion Manager Mid-Continent Region
Aug. 1, 1963 to Jan. 19, 1964	Sales Promotion	Manager Sales Promotion North Central Region
Jan. 20, 1964	Resigned	

J. L. Baldwin, Jr.

Jan. 1, 1960 to Jan. 10, 1960	East Chicago Plant	Project Engineer
Jan. 11, 1960 to April 30, 1960	Personnel	Staff Assistant
May 1, 1960 to August 31, 1960	Lakeland District	Sales Correspondent
Sept. 1, 1960 to June 30, 1962	Credit - New York	Credit Representative
July 1, 1962 to Mar. 31, 1965	Credit - New York	Field Credit Manager
April 1, 1965 to Sept. 15, 1965	Financial Analysis	Sr. Financial Analyst
Sept. 16, 1965 to Jan. 13, 1966	Chicago Administration Center	Administrative Manager

Date	GX-7 Department	Position
J. L. Baldwin, Jr. (Contd.)		
Jan. 14, 1966 to August 31, 1967	East Construction Products Division Office	Manager Administration
Sept. 1, 1967 to Oct. 31, 1968	Marketing Policy Administration	Director Marketing Policy
Nov. 1, 1968 to Aug. 31, 1969	U.S.G. Urban Development	V.P. Project Development
Sept. 1, 1969 to May 13, 1971	Financial Administration	Assistant to V.P. Finance
May 14, 1971	Resigned	
H. C. Bear		
Jan. 1, 1960 to Feb. 11, 1962	General Merchandising	Vice President Merchandising
Feb. 12, 1962 to Feb. 28, 1966	Services	Vice President
Mar. 1, 1966 to Dec. 31, 1968	Acquisitions	Vice President
Jan. 1, 1969 to Dec. 27, 1973	Financial Administration	V.P. Acquisitions
Richard J. Croak		
Jan. 1, 1960 to July 31, 1962	Credit Dept. - Dallas	Div. Credit Mgr. - Dallas
Aug. 1, 1962 to July 15, 1963	Credit - Dallas	Div. Credit Mgr. - So. West
July 16, 1963 to Jan. 31, 1964	Credit - Dallas	Field Credit Mgr.
Feb. 1, 1964 to Mar. 31, 1965	Credit - Chicago	Credit Mgr. - Field Servs.
April 1, 1965 to Dec. 31, 1965	Credit - Los Angeles	Regional Credit Mgr.
Jan. 1, 1966 to Feb. 28, 1966	Los Angeles Credit	Credit Mgr. - Western Div.

Date	GX-7 Position
Robert Fredericks	
May 1963 to Jan. 1965	Treasurer - Controller, Chief Financial Officer
Jan. 1965 to April 1965	President
J. M. Kelly	
May 1964 to April 1965	Regional Credit Manager (San Francisco)
K. A. McCaskill	
Jan. 1, 1960 to 1962	District Manager for Bestwall Certain-Teed Sales Corp.
1962 to Oct. 31, 1963	General Sales Manager for Bestwall Certain-Teed Sales Corp.
Nov. 1, 1963 to April, 1965	Vice President of Sales - Bestwall
A. L. E. Meyer	
Jan. 1, 1960 to 1962	Sales and Handling - Bestwall Certain-Teed Sales Corp.
1962 to Oct. 31, 1963	Director or Merchandising - Gypsum Products - Bestwall
Nov. 1, 1963 to 1965	Advertising Manager
1965 to April 1965	Director of Merchandising - Gypsum Products
Malcolm Meyer	
Jan. 1, 1960 to 1963	Director and Executive Vice President of Bestwall
W. S. Mole	
Jan. 1, 1960 to April 1965	Regional Sales Manager for Bestwall

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SCHEDULE B

TITLES AND TENURES OF INDIVIDUAL DEFENDANTS

Andrew J. Watt

United States Gypsum Company

Date	Position
Jan. 1, 1960 to Jan. 15, 1961	Vice President, Promotion and Advertising
Feb. 13, 1962 to Nov. 9, 1965	Vice President, Marketing
Nov. 10, 1965 to Aug. 31, 1967	Senior Vice President, Marketing
Sept. 1, 1967 to May 13, 1969	Senior Vice President
May 14, 1969 to Dec. 27, 1973	Executive Vice President

The Gypsum Association

April 1963 to Oct. 1963	First Vice President & Director
Oct. 1963 to April 1965	President, Chairman of the Executive Committee
April 1965 to April 1970	Director, Member of the Executive Committee
April 1970 to April 1971	Treasurer, Director, Member of the Executive Committee
April 1971 to April 1973	2nd Vice President, Director, Member of the Executive Committee
April 1973 to April 1974	1st Vice President, Director, Member of the Executive Committee

	1960	1961	1962	1963
United States Gypsum Company	$124,508,000	$122,751,000	$129,087,000	$135,246,000
National Gypsum Company	79,133,593	77,624,169	82,593,866	84,870,221
Georgia-Pacific Corporation[1]	none	none	none	none
The Celotex Corporation[2]	none	none	none	none
American Gypsum Company[3]	206,311	1,483,819	3,527,687	4,053,464
Bestwall Gypsum Company	31,945,000	34,490,000	39,055,000	41,226,000
California Gypsum Products, Inc.[4]	none	none	none	none
The Celotex Corporation[5]	unknown	11,923,415	13,515,080	13,965,274
Fibreboard Corporation	7,485,000	8,291,000	10,872,000	13,024,000
GAF Corporation[6]	1,558,251	1,810,480	2,036,596	2,032,441
Grand Rapids Gypsum Company	1,507,696	1,437,556	1,373,302	1,595,299
Johns-Manville Corporation	none	2,483,000	6,065,000	7,970,000
Kaiser Gypsum Company, Inc.	16,500,575	16,826,875	19,264,638	22,533,402
Republic Gypsum Company	none	none	none	none
Texas Gypsum Company, Inc.	20,791	712,442	767,466	1,882,922
The Flintkote Company		10,029,761	11,524,450	13,308,135
Weyerhaeuser Company	none	none	none	920,000

1 Sales figures for 1965 are for May through December.
These figures include sales to Georgia-Pacific's distribution centers at the prices charged to thos

2 The figures are for fiscal years ending August 31st in the years shown and include sales of Big Hor

3 Sales figures for 1965 are for January through April.

4 Sales figures for 1972 are for July through December.

5 This corporation ceased to exist August 31, 1964. The figures are for fiscal years ending October
August 31st in the other years shown, including sales of Big Horn Gypsum Company, its subsidiary c

6 1970 sales for two months only.

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SCHEDULE C

Sales of Gypsum Board
(In Dollars)

1964	1965	1966	1967	1968	1969	1970	1971	1972
$135,847,000	$124,096,000	$108,719,000	$104,539,000	$125,946,000	$124,419,000	$101,295,000	$136,045,000	$172,415,000
86,212,185	80,906,649	75,665,545	75,347,612	83,676,606	86,228,069	79,574,585	103,437,529	131,930,90[illegible]
none	23,178,436	37,861,927	42,876,441	40,921,832	38,772,402	36,895,944	47,250,431	59,209,14[illegible]
none	21,046,419	22,373,162	22,872,770	35,701,625	34,140,053	28,998,415	28,728,726	34,603,49[illegible]
4,334,432	3,296,548	4,666,016	4,833,087	4,346,375	3,709,446	3,081,200	5,036,295	6,469,39[illegible]
41,209,000	11,571,843	none	none	none	none	none	none	none
none	none	none	none	none	none	none	none	762,7[illegible]
18,529,705	none	none	none	none	none	none	none	none
10,837,000	6,762,000	5,232,000	4,618,000	1,543,000	435,000	none	none	none
2,443,637	2,403,665	2,913,000	3,143,769	3,357,600	1,570,323	168,946	none	none
2,458,602	2,532,094	3,544,898	4,346,175	4,480,743	3,930,289	3,150,457	4,925,389	5,163,77[illegible]
8,979,000	7,113,000	7,016,000	8,081,000	12,770,000	12,161,000	9,372,000	14,094,000	17,960,00[illegible]
21,602, 214	17,575,321	15,979,256	17,133,043	22,933,841	24,669,871	20,196,806	28,493,046	35,013,38[illegible]
none	1,121,000	3,872,000	5,254,000	5,850,000	6,169,000	5,095,000	5,427,000	7,846,000
3,331,915	2,293,578	2,834,272	4,216,620	3,189,152	4,738,308	3,919,758	5,693,706	6,431,952
14,740,330	14,556,453	15,692,294	18,153,425	22,240,486	22,565,223	18,864,614	27,822,000	
4,219,000	5,192,000	6,168,000	7,109,000	8,380,000	7,333,000	6,302,000	8,149,000	10,261,000

ose centers.

lorn Gypsum label products.

r 31st in 1961 and 1962 and
corporation.

GX 16

[redacted]
GX-16

December 2, 1966

Mr. R. I. Fredericks — Paoli

W. H. Hunt — Portland

As always, it was wonderful to have an opportunity to spend some time with you. I want to tell you, also, how much your cooperation and understanding in the matters we discussed is appreciated. I know you are going to do well and I think that probably I, personally, am as interested in seeing you do well as you are yourself.

Probably by Tuesday afternoon, I will be talking with you at length again. In the meantime you know where to reach me if you call, or have need to do so.

We mentioned briefly the fine legal review which John Crowell made of the gypsum industry and the price methods used therein. In this short conversation, I believe it was accepted that most of his recommendations are things we ought to either accept in total or in revised form. At any rate, I feel this way generally, and assume that you do, too, from what you said and have taken action along certain lines.

Referring to John's summary in the order of the points listed:

1) It is my belief that this should be emphasized.

2) Certainly this is something we should be conscientious about, and I am sure we have been.

3) I am in complete agreement with this and am sure that you are, too.

4) This might be a good thing to do, but I doubt that we have been doing it. You might check with the boys and use your own discretion.

5) This, I believe, makes sense and it seems to me that you said this has already been done.

Best regards!

W. H. H.

WHH:df

DOCUMENT No. 1A [illegible] 9 052556
A.T.N. — [redacted]

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GX-16

GEORGIA-PACIFIC

INTERDEPARTMENTAL COMMUNICATION

DATE November 1, 1966

TO Mr. W. H. Hunt — LOCATION Portland

FROM John B. Crowell, Jr. — LOCATION Portland

SUBJECT: Legal Review of Gypsum Pricing

NOV 4 1966

You will recall that in late June Frank Breuer, Tom Withycombe and I suggested to you that the makeup of the gypsum industry and the pricing of gypsum were enough different from other G-P product lines to warrant someone from the Portland Legal Department developing some familiarity with these matters. You and Bob Fredericks subsequently agreed that this would be a good idea. It was not until September 6th and 7th, however, that I, who was delegated this assignment, was able to carry out the portion involving a trip to Paoli; not until now have I had the opportunity to make a report.

As a result of my investigations, I am satisfied that prices in the gypsum industry to date have not been the result of either expressed or implicit agreements among competing manufacturers. You will recall that we were concerned over this possibility particularly after the stresses which had been experienced by the industry in 1964 and 1965 followed by the modest price increases of this year. However, I am not at all sure after reading a number of cases affecting industries with relatively few members that the gypsum industry is much different from some of those industries; the existence of "agreements" was inferred in those cases from the existence of various practices, many of which exist or have parallels in the gypsum industry. All those cases, however, were ones where the FTC was treating such "agreements" simply as unfair methods of competition; they were not criminal cases, nor as a rule did they have the effect of encouraging private treble damage actions.

Because overcapacity in the gypsum industry will prevail for some years to come, prices can be expected to be under constant pressure. This pressure is very apt to be increased by the decentralization of Bestwall's marketing functions to G-P's Distribution Division regions, particularly if Bestwall pricing authority no longer remains strongly centralized. Price concessions in any of a variety of forms by any gypsum manufacturer will inevitably trigger defensive concessions by the competition; such concessions may spread beyond the local area in which they arise, with a consequent widespread deterioration in gypsum prices. Since this is so, it seems to me imperative that the transfer of gypsum selling functions to the Distribution Division be carefully planned by the knowledgeable people within Georgia-Pacific-Bestwall, that this transfer not proceed haphazardly, and that it be effected only as the Distribution Division personnel involved acquire a thorough understanding of the gypsum business and appreciate how pricing changes can have widespread effects on profits from gypsum sales.

The temptation is very strong in the circumstances in which the gypsum industry currently finds itself for competitors to attempt by means of meetings and agreements between them, either to localize the effects from occasional outbreaks in pricing competition or to stifle such competition in any of a great number of ways. Such meetings and agreements are equally a temptation at the local, regional or national levels. Obviously, any such meetings or agreements would be illegal and subject to severe anti-trust penalties to participating companies and individuals alike.

Because the industry is comprised of so few national producers who thus could, by means of meetings and agreements, impose restrictions on competitive pricing of gypsum, those producers, G-P being among them, must be extremely cautious and circumspect about their contacts with one another. This is all the more true in a supply-demand situation where maintenance of firm prices without collusion requires considerable self-restraint, self-discipline, and even forbearance by each competitor.

To avoid contacts being misconstrued, the number of them should be minimized to the fullest extent possible. When contacts do occur, they should be open and above board; in fact, it could prove to be a valuable protection, particularly when executives who have considerable pricing authority for their respective companies are meeting together for conversations or negotiations on permissible subjects, to have a lawyer present. The presence of a lawyer can assure that dangerous ground is avoided; the lawyer would also be able to confirm, in the event of later investigation, the nature of the conversations. The lawyer's capacity is one, if not of a disinterested third person, at least that of a person whose professional objectives are to see that his clients stay out of trouble.

I am told that at present there are telephone calls as often as once a day, sometimes more often, between Paoli's Sales Department and competitors for the purpose of verifying a salesman's report of information from a customer that the customer has received a certain offer. The purpose of verification between competitors is to be sure that the customer is being truthful with the salesman. The trouble with such contacts is that they are susceptible of being construed by unfriendly outsiders as policing of a conspiracy or agreement to maintain fixed prices. Obviously, verifications of this nature should be kept to a minimum, but I think as a practical matter it would be unreasonable to suppose that they can be eliminated all together.

At present most such contacts with competitors are handled by Bob Sikes who is Pricing Administrator at Paoli. (Incidentally, I think his title has unfortunate connotations and should be changed to something less suggestive.) Other such contacts, though made by someone else, still originate

from Paoli. With the shifting of sales functions for gypsum to the distribution division, the occasions for similar competitor contacts at local and regional levels may become more common. I think they should not be made at this level, however, primarily because the job is a ticklish one and should be handled only by a man who knows the risks and limitations and who has a company attorney virtually at his elbow. For this reason, I suggest that all competitor contacts for the purpose of checking on a customer's representations continue to be handled in every case from Paoli; inquiries of this nature originated by competitors should be referred there also.

It is further my considered opinion that brief file memoranda should be kept by G-P of all such verifications of existing offers and prices, regardless of whether G-P initiates or receives the verification. Such memoranda would certainly rebut any implication of secrecy which is usually one characteristic of a conspiracy; they would also tend to prevent, although not altogether eliminate, an implication that the conversations ranged beyond purported verifications; they could be used by company personnel who might be examined informally or under subpoena to refresh recollection of details of conversations, thereby enhancing the credibility of denials that any price agreements were involved. There can be disadvantages, too, but I think they are outweighed by the factors mentioned.

In summary, then,

1) Conscious effort should be made to keep competitor contacts at all levels to a minimum, particularly among sales personnel and those with pricing authority.

2) Top level contacts must be conducted with great circumspection, openly, candidly, and with no reference to pricing practices.

3) Confirmation of representations made by a customer concerning offers of a competitor should be as infrequent as possible, but when resorted to should be made through a central office by one or two men who have been fully advised as to the legal limits of their conversations.

4) A memorandum record should be kept of all such confirmatory contacts.

5) Bestwall Division's job designation of "Pricing Administrator" should be changed.

GX-16

Mr. W. H. Hunt -4- November 1, 1966

Three attachments to this memorandum treat in depth a number of the matters touched upon.

J. B. C.

JBC:pm

Attachments

cc: F. G. Breuer
R. I. Fredericks
H. J. Kane
K. A. McCaskill
H. E. Sand
J. R. Slothower
R. L. Smith

052561

GX-16

Attachment - Pricing of Gypsum Products

Modified Multiple Base Pricing Prior to 1964

Until 1964, gypsum products historically were sold by the manufacturer at a list price plus freight. The mill closest to the point of purchase was the point from which freight was computed. Under this system, there never was any "phantom" freight, but there was freight absorption by the manufacturer of all freight charges in excess of the freight which would be charged from the mill nearest to the purchaser. This system is not quite the same as a multiple basing point system, where a given point remains fixed as the point from which freight is computed. Such a system is more vulnerable to inferences of price fixing because the maintenance of a fixed basing point favors the competitor who is at or closest to that point.

Adoption of Zone Pricing

About 1964, U. S. Gypsum adopted a zone method of pricing which the rest of the industry subsequently followed with modifications: the modifications in turn were adopted by U. S. Gypsum. Initially there were some 160 zones; during 1964 and 1965 the number was reduced to about 30. Under the zone system of pricing, a delivered price is established for each zone. The manufacturer thus pays the freight on each shipment and consequently has highest per unit recovery on shipments where freight is low, lowest per unit recovery on shipments where freight is costly. Cash discounts are computed without the deduction of freight in order to maintain a constant delivered price throughout the zone; if deduction of freight were required before computation of the cash discount, purchasers would have lower net prices if they were to buy from the closest manufacturer.

The zones originally set up by United States Gypsum were modified by both National and Bestwall before each independently came out with its own new proposal for zone pricing. I have been assured that there was no communication between the manufacturers concerning adoption of the zone pricing system. Certainly I have been assured by Bestwall people that there was none with Bestwall and from the way the system developed it seems unlikely that there was any discussion of the matter among other manufacturers. It was simply a case of the traditional industry leader utilizing its position of dominance to adopt a new pricing system presumably advantageous to itself and which the rest of the industry met with modifications in order to remain in a position where they could compete with the industry leader.

DOCUMENT No. A.T.N. 052571

Recent Price Changes

The increased production capacity which was in operation by 1964 was probably, as much as anything, the cause of deteriorating prices in 1965. A contributing factor may also have been competitive uncertainty and nervousness when Georgia-Pacific's Distribution Centers began making sales out of warehouse to dealers who were not on rail spurs. At any rate, serious discounting from published list prices developed throughout the industry. A virtually chaotic marketing condition resulted for an industry which previously had been accustomed to fairly stable pricing. As a consequence, there was a great deal of competitor contact between the national sales offices of various companies in attempts to check on reported pricing situations from the field. Extended terms for payment, direct trucking, rail car unloading allowances and other practices became prevalent and added to the pricing confusion and the subsequent deterioration of profits.

In December, 1965, National Gypsum announced a price increase, at the same time undertaking to reduce the number of zones in which the new prices were to be effective to a more manageable number. U. S. Gypsum responded by announcing higher prices of its own, also to be effective on January 1, 1966 but with some modifications to National's revision of zones. As part of its announcement to the trade of higher prices, U. S. Gypsum stated that it was listing with Arthur Andersen & Company the jobs it would protect from the effects of the price increase; any competitor was free to inquire of the accounting firm as to whether or not a job was being protected from the higher prices. Thus, U. S. Gypsum headed off any interpretation of continued sales at reduced prices as being an indication that the announced price increases were not in fact being charged by U. S. Gypsum.

In May, 1966, a second minor price increase was announced by U. S. Gypsum which in turn was followed by National and then others only partially. The lower of the new prices subsequently became effective. In the central and south central states where a disproportionally large number of plants are situated because of proximity to deposits, the four independents---Dierks, Republic, Texas, and American---all maintain a price lower than the prices of the majors.

Terms of Payment

It was also in May, 1966, or thereabouts, that Bestwall followed National Gypsum in attempting to roll back what had become extremely liberal credit terms during the period of pricing chaos. A good many large accounts at this time had to be weaned back to normal short terms

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with notes amortized over six months to a year with, in some cases, the possibility of further extension of the notes. As of September, 1966, it was apparent that Kaiser Gypsum was having trouble making its attempts to reduce credit terms stick. Presumably, Kaiser had used liberalized credit terms as one means of attracting business for its newly constructed East Coast plants and was meeting strong resistance from its customers in attempting to reduce credit terms.

Favored Position of U. S. Gypsum

By the fall of 1966, indications from the market place were that the price increases of the preceding nine months were pretty well in force. However, the modesty of the increases is evident from the fact that prices were still some 10% below 1963 levels. There were no indications that discounting from announced list prices was being employed as a means for attracting business.

The industry leader has certain inherent advantages, however, which often make it difficult for others to compete on the same terms. U. S. Gypsum is the most formidable competitor in gypsum product sales basically because its 26 mills are located favorably in relation to raw material supplies of gypsum on the one hand and to markets for its products on the other. Partly because of the number of its mills and partly because of its good technical force, U. S. Gypsum is able to realize mill operating efficiencies. Because of the economies permitted by the advantages of location and operating efficiencies U. S. Gypsum can afford a large and well trained (and necessarily more expensive) sales force; it can also better afford to sell to poor credit risks who thus get "locked in" to purchasing from U. S. Gypsum. If they subsequently become better financial risks, they have great loyalty to U. S. G.

Discounts to Volume Purchasers

Bestwall in recent years has offered discount concessions to large volume dealers. Most recently some effort has been expended to eliminate even this form of cost justifiable discount. It seems likely, however, that discounting to large volume purchasers who are good financial risks will increase rather than decrease not only for Bestwall but with respect to other manufacturers of gypsum products. In fact, such a practice is desirable from the standpoint of tending to negate any inferences of existence of a pricing conspiracy; it is desirable as long as the discounts are justifiable on a cost-savings basis or on the basis of meeting competition.

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Government Business

Gypsum products are not customarily purchased or bid by anyone other than the Federal government. Much of such business is on U. S. military purchasing. Response to bids is usually based on price lists for the material which alone would lead to identical pricing under the zone pricing system. However, bid differences crop up in the costs of packaging which usually are fairly closely specified by the advertising agency. The bid form is designed in such a way that prices are not itemized but are lumped. Thus, the identity of gypsum product pricing is not obvious from such bid forms. I am told it is not a practice by Bestwall or presumably by anyone else in the industry to communicate with competitors prior to preparing responses to government bids. Bestwall builds on its experience from past bids. Non-competitive bidding on government contracts is apt to trigger anti-trust investigations. Even where there are no agreements on price nor any bid-rigging in practice, an industry with limited numbers of sellers must be careful not to create appearances from which harmful inferences can be drawn. I would think that price shaving on government bids would be a desirable practice for Bestwall, to the extent the business is attractive, there being little danger that this could lead to general price deterioration.

DOCUMENT No. 8
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Attachment - Economics of the Gypsum Industry

Nature of the Product

There are only 14 gypsum product manufacturers in the United States. Of these, 7 operate only one plant. United States Gypsum Company is the dominant factor, operating 26 plants and having approximately 45% of annual gypsum sales. National Gypsum operates 19 plants and accounts for approximately 20% of sales. The Bestwall Division of Georgia-Pacific is the next biggest in the industry with approximately 13% of gypsum's annual sales through operation of 9 plants. (Attached is an appendix listing the gypsum manufacturers and their plant locations.)

Because the end product is heavy and consequently expensive to transport, location of production facilities close to markets is obviously advantageous. Production facilities in turn must necessarily be located close to sources of raw gypsum or to deep water ports into which gypsum is transported from mining sources which are themselves close enough to deep water to take advantage of water transport's low costs. Principal gypsum deposits in the United States are located generally in the mid-continent area, with a few exceptions. Raw gypsum for East Coast plants comes either from Newfoundland, Nova Scotia, or New Brunswick or from deposits in the West Indies; raw material for Pacific Coast plants comes from Mexican mines.

System of Distribution

Sales of gypsum products traditionally have been made by the manufacturer through the individual who controls designation of the specific material to a particular job or jobs; i.e., the architect and/or builder on large projects and the builder or subcontractor applicator on smaller jobs. Deliveries, however, have traditionally not been made by the manufacturer direct to the job but have gone instead to a local dealer. The dealer thus in such cases serves primarily a warehousing function, although dealers do make some sales unassisted by the manufacturer, particularly to small contractors who are the dealers' regular customers. A dealer may be a building-materials dealer, a hardgoods (sand, gravel, concrete) dealer, or a dry wall specialties dealer.

A dry wall specialties dealer is a large volume dealer in gypsum products and is representative of a class which has sprung up in large markets in the last 12 or 15 years; such dry wall specialty dealers developed their business from an applicating business which became successful enough to warrant buying in carload quantities. Sometimes such an applicator has expanded not just into dealing in dry wall specialties but also into building materials generally.

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The distribution picture is further complicated by the fact that some dealers stock slow-moving dry wall items which they subsequently resell to other local dealers.

It is through these dealer outlets that sales are made to the dry wall applicator who is generally a subcontractor to a builder, or directly to the builder himself. When sold to a builder, the builder usually subcontracts application of the dry wall material.

Between 10 and 15 per cent of wall board goes to industrial accounts, i.e., highrise apartments, hospitals and office buildings. Sales to these so called industrial accounts require particularly specialized salesmen who invariably are employed by the gypsum manufacturer. Not only on industrial accounts but on most other types of accounts, the manufacturer's salesman induces the architect, builder or applicator to specify the particular manufacturer's product. The salesman then presents the order to his manufacturer's local dealer.

Production Capacity

In late 1964 and through 1965, gypsum prices, which had theretofore been relatively stable, experienced serious erosion. This erosion was attributable primarily to large increases in production capacity within the industry. These increases probably were triggered by an agreement between Kaiser and National. By this agreement, Kaiser agreed to sell rock to National from its Mexican mines and National agreed to sell Nova Scotian rock to Kaiser. As a consequence, National was able to build its first two West Coast plants at Richmond and Long Beach, California, while Kaiser was able to construct its first East Coast plants in New Jersey and Florida. Other companies with expansion plans for the California and East Coast markets had to accelerate them in order not to be left behind in the race for market shares. The production capacity resulting from this flurry of construction leaves the industry with considerable overcapacity which, by present projections, will not be fully utilized until the early 1970's. The picture of overcapacity, however, varies in different regions of the country.

Role of G-P Branches in Distribution of Gypsum

Georgia-Pacific is the only gypsum manufacturer who has a chain of distribution centers. The distribution centers, however, as they are currently operated, do not fit into any step of the industry's existing system of distribution for gypsum products except to the extent that dry wall specialty, building materials, or hardgoods dealers receive rail shipments and then

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resell to smaller dealers or to those who are off-rail. The distribution centers would theoretically be suited to performing such a warehousing and jobber function, but it would be at the expense of whatever retail business the dealers now serving such functions presently generate. Unless the G-P Distribution Centers were to undertake retail sales and job site deliveries for gypsum, in which case they would be taking over the entire function presently served by dealers, the distribution centers physically offer no advantage to Bestwall under the present system of distributing gypsum products.

However, there would seem to be several possibilities for using the physical facilities of the distribution centers to enhance distribution of Bestwall products. One would be to transship from the centers by truck to small building materials and hardgoods dealers who do not now sell any gypsum products, either because they are off-rail or because they are too small to be able to handle a rail carload with the necessary frequency of turnover. There might be a very substantial market to be tapped in this way particularly away from bigger towns and cities.

Truck deliveries are more expensive, however. Furthermore, existing dealers who now buy in rail carload quantities are going to want either the benefits of fast service and lower inventory costs afforded by truck deliveries or they are going to want a lower price for continuing to take deliveries by rail car. For Georgia-Pacific, it makes particularly good sense to offer truck deliveries to dealers who receive deliveries of other G-P products from a truck which could just as well deliver gypsum also. But for G-P to make truck deliveries of gypsum at the same price it makes rail deliveries would be a sacrifice of some G-P profit and would lead to competitors offering lower prices in order to induce the dealer to accept what for him are the disadvantages of rail deliveries, a general decline in gypsum prices would inevitably result.

Thus, G-P might well consider charging a higher truck delivered out-of-warehouse price than it charges for rail delivered gypsum products. The on-rail dealer could choose his method of delivery; the off-rail dealer who does not compete for resales with an on-rail dealer would pay the higher prices. The off-rail dealer who does compete with an on-rail dealer simply could not afford to pay the higher price and presumably would stay out of the gypsum reselling business. He could not claim price discrimination by G-P because G-P could demonstrate that the lower price to the on-rail dealer was cost justifiable.

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GYPSUM ASSOCIATION

MEMBER COMPANY OPERATING FACILITIES

BARRETT DIVISION
ALLIED CHEMICAL CORPORATION

Edgewater, New Jersey

AMERICAN GYPSUM COMPANY

Albuquerque, New Mexico

THE CELOTEX CORPORATION

Fort Dodge, Iowa
Port Clinton, Ohio
Hamlin, Texas

BIG HORN GYPSUM COMPANY

Cody, Wyoming

FABCO GYPSUM DIVISION
FIBREBOARD CORPORATION

Newark, California
South Gate, California
Florence, Colorado
Las Vegas, Nevada

THE FLINTKOTE COMPANY

Savannah, Georgia
Camden, New Jersey
Sweetwater, Texas

BLUE DIAMOND GYPSUM DIVISION
THE FLINTKOTE COMPANY

Fremont, California
Blue Diamond, Nevada

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GX-16

GEORGIA-PACIFIC CORPORATION
WESTWALL GYPSUM DIVISION

Wilmington, Delaware
Brunswick, Georgia
Fort Dodge, Iowa
Blue Rapids, Kansas
New Orleans, Louisiana
Grand Rapids, Michigan
Akron, New York
Quanah, Texas
Sigurd, Utah

GRAND RAPIDS GYPSUM COMPANY

Grand Rapids, Michigan

KAISER GYPSUM COMPANY, INC.

Antioch, California
Long Beach, California
Jacksonville, Florida
Delanco, New Jersey
Rosario, New Mexico
Seattle, Washington

NATIONAL GYPSUM COMPANY

Phoenix, Arizona
Long Beach, California
Richmond, California
New Haven, Connecticut
Tampa, Florida
Garden City, Georgia
Waukegan, Illinois
Shoals, Indiana
Fort Dodge, Iowa
Medicine Lodge, Kansas
Westwego, Louisiana
Baltimore, Maryland
National City, Michigan
Portsmouth, New Hampshire
Burlington, New Jersey
Bronx, New York
Clarence Center, New York
Lorain, Ohio
Rotan, Texas

REPUBLIC GYPSUM COMPANY

Duke, Oklahoma

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GX-16

THE RUBEROID CO.

Caledonia, New York

TEXAS GYPSUM COMPANY, INC.

Irving, Texas

UNITED STATES GYPSUM COMPANY

Midland, California
Plaster City, California
Santa Fe Springs, California
Jacksonville, Florida
East Chicago, Indiana
Shoals, Indiana
Fort Dodge, Iowa
Sperry, Iowa
New Orleans, Louisiana
Baltimore, Maryland
Boston, Massachusetts
Alabaster, Michigan
River Rouge, Michigan
Heath, Montana
Empire, Nevada
New Brighton, S. I., New York
Oakfield, New York
Stony Point, New York
Gypsum, Ohio
Southard, Oklahoma
Philadelphia, Pennsylvania
Galena Park, Texas
Sweetwater, Texas
Sigurd, Utah
Norfolk, Virginia
Plasterco, Virginia

GX-18

GEORGIA-PACIFIC

FEB 4 1969
GX 18

INTERDEPARTMENTAL COMMUNICATION

DATE: February 4, 1969

TO: See Below *

LOCATION:

FROM: John B. Crowell, Jr.

LOCATION: Portland

SUBJECT: Southeastern Container Case

Enclosed is a brief summary and comment on a recent case in the United States Supreme Court which deals with the matter of competitor contacts. This has been prepared with the thought that you will probably want to distribute it to people in your divisions who have sales responsibilities.

J. B. C.

117115

JBC:ps
Enclosure

cc: Mr. R. B. Pamplin - w/encl.
Mr. F. G. Breuer - w/encl.

* Messrs. J. N. Cheatham
R. E. Flowerree
W. H. Hunt
H. J. Kane
J. H. Dunkak
G. G. Evans
J. E. Frew
J. Jorgensen
F. V. Langfitt, Jr.
R. O. Lee
J. E. Meadows
H. A. Merlo
H. S. Mersereau
A. G. Naudain
D. W. Oakley
H. E. Sand
R. A. Schumacher
G. E. Wilson

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V. E. C. - 8/1/72
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GX-18

SOUTHEASTERN CONTAINER CASE

The opinion of the United States Supreme Court rendered in U.S. v. Container Corporation of America et al. (known variously as the Southeastern Container case or as the Greensboro case), is an appropriate occasion for supplementing and illustrating directions concerning pricing practices contained in the Operating Policy Manual.

The case was brought under Section 1 of the Sherman Act which provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce...is hereby declared to be illegal."

The Supreme Court opinion in the Container Corporation case holds that even occasional and infrequent exchanges of information between manufacturers of shipping containers for confirming or ascertaining the latest price or quotation made by one of them to a particular customer was sufficient evidence of an agreement and combination. The Court went on to find that these exchanges of information had the effect of tending toward price uniformity and thus created the illegal restraint of trade prohibited by Section 1 of the Sherman Act.

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The decision was reached despite evidence in the case that in the eight years prior to 1963 (when the case started) demand in the southeast for shipping containers had doubled, the number of manufacturers had increased from 30 to 51, the number of box plants had increased from 49 to 98, capacity exceeded demand, and consequently the trend of prices had been downward. The Court's opinion fails to discuss the strong argument made by defendants that these occasional confirmations of prices and quotations were only to confirm the veracity of representations made to the manufacturer by a prospective buyer respecting prices available from other sellers.

Because the Court's ruling was made in a factual context which seemingly could well have justified the very limited exchange of pricing information involved, it is extremely difficult to imagine that any court in the future will regard as legal any direct exchange of price information between competitors with respect to particular customers regardless of any purported justification.

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Consequently, we must thenceforward be particularly on guard against asking a competitor for information concerning prices or quotes to his customer or against responding to such a request from a competitor. The consequence of our violation of the Sherman Act can be injunction against continuation of the practice (which is the result in the Southeastern Container case), fines and jail sentences, and exposure to treble damage recovery from G-P by injured purchasers or prospective purchasers.

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LEGAL ASPECTS OF SELLING

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Legal Aspects of Selling

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Ignorance of the law is no excuse. No matter what a man's business, profession or status in life, he is charged with knowing the law applicable to the activities in which he engages and he cannot defend himself by saying he did not know there was such a law or, knowing of the law, did not know what it meant.

This applies to corporations as well as to individuals. A corporation can only do business through agents and the acts of its agents - its employees - are the acts of the corporation. Each of you is an agent of the United States Gypsum Company. Your actions, what you say and write in connection with company business, are normally binding on the company and has legal significance. If you violate the law in connection with company business, you may not only be individually liable but also make the company liable.

You may think that the law imposes on you an impossible task. How could you possibly know all of the laws which might apply to the business transactions in which you are engaged? But you do not need to know these laws in all of their ramifications. You do need to know that there are laws involving activities in which you are engaged and the general purposes of those laws, so that in carrying on your day-to-day business transactions you can appreciate when there is or may be a legal problem. Without a basic appreciation of the laws applicable to your business you are in no position to seek legal advice when you need it, without which you may commit yourself and your company to a course of action with legal consequences which you never intended and penalties which you would have avoided at all cost.

It is not the purpose of this memorandum either to try to make lawyers of those engaged in selling or to catalogue all of the legal problems that may be encountered. Rather, the purpose is simply to review some of the basic laws which may become applicable to your day-to-day business transactions.

1. Misrepresentation of Products. Every salesman should understand that if he claims more for a product than can be justified, he is involving his company in what may be serious legal consequences. In ordinary sales, there is little occasion for your making any representations, and in the

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absence of representations the company's responsibility is simply that the material sold be of merchantable quality, meaning that it is reasonably fit for the general purpose for which manufactured. Whether or not they are of merchantable quality is a manufacturing and executive problem not ordinarily involving the district manager or his salesmen.

But if claim is made that they are not of merchantable quality, then what is the company's responsibility? The important thing to know is that the company's responsibility runs normally only to the dealer or buyer to whom the goods are sold and not to his customers. If the contractor purchasing from the dealer complains that the product is not of merchantable quality he has his remedy against the dealer, who in turn has a remedy against you. But you have no responsibility to the contractor. Of course in many cases your business interests may dictate that you back up the dealer and help him defend the quality of the products, or the contractor may be an important one and you want his good will and so undertake to deal with him directly with respect to the quality of the product. But knowing that your responsibility runs only to the person to whom you have sold the goods (the dealer) and not to his customer (the contractor), you are in a position to deal with the situation as your business interest dictates.

But there are many cases where you may be called upon to make specific representations with reference to your products or combinations of such products and their performance in the completed construction. Many USG products are not consumer goods but are raw materials to be used in combination with other raw materials to produce a completed construction. Therefore, you may be asked from time to time how your products will perform when used in connection with certain other products or in connection with a particular type of construction. These instances may occur in connection with the erection of a large building or some fairly extensive development but may occur even with respect to a single dwelling. The question will probably come from a contractor or an owner or his architect who wants to know how your products will perform in a particular type of construction. It may be that you have sought out that contractor or architect to induce him to specify your products as the ones to be used. In such case if you over-represent the products or misrepresent what they will do, then the company may become liable to the contractor or owner not only to the extent of the value of the products sold but for all the consequential damages, which might conceivably include the tearing out and replacing of parts of the structure.

Very often misrepresentation of the qualities of a product causes the company considerable damage even though the particular claim can be successfully defended. For example, some years ago a suit was filed against the company for a substantial sum of money because you represented that

Rocklath would not expand or contract - a representation contained in the Red Book for many years. On investigation you found that it does expand and contract to a small extent, but to an extent that would never account for the cracking of plaster which occurred. Nevertheless, the defense of that suit cost the company a lot of time and money. Recently salesmen of the company represented to a builder and his architect that a particular type of wall construction using your materials would have a certain sound transmission value. The representation was extreme, and the threatened law suit had to be settled for a substantial amount.

Therefore, it is vitally important that when you represent the qualities of your products you know that they have the qualities you represent them to have. This is becoming more important in a period when you are not only offering new products but your products are being used in combination with other products with which they have never been combined before and new methods of construction are being tried out.

In many instances you will know the answer readily. In others there may be a question to be decided by your engineering and research departments based upon an examination of the plans for the particular job.

2. Terms and Conditions of Sale. It has become almost uniform practice among manufacturers of materials to incorporate limiting terms and conditions of sale in their sale transactions. This is primarily because the Uniform Sales Act, in force in most of the states, is designed to afford maximum protection for buyers. Hence, in the absence of limiting contractual terms, that law provides broad warranties which in many cases impose obligations far beyond the intention of the seller, and broad remedies which permit the recovery not only of direct, but also indirect and consequential damages where such can be proved. There have been many instances where the sale of a few dollars' worth of defective material or equipment has resulted in large consequential damages being recovered from the seller. Sellers, therefore, have found it necessary to limit both the scope of their warranties and the obligations which they assume, because the rights and obligations created by such laws can be superseded by express contractual provisions.

This is not always easy to do, for in contrast to formal written contracts which include a single set of conditions and are signed by both parties, sales transactions normally involve an exchange of printed forms. This leads to both sellers and buyers attempting in various ways to preserve rights and limit their obligations by each trying to get its terms and conditions into the hopper as the last paper before the sale is consummated. This jockeying for terms in sales transactions presents practical problems as to how a seller can handle the great bulk of his transactions at least in a

way that will result in the sale being covered by its own terms and conditions.

The ideal situation legally would be for each of your order forms recording orders received to be signed by the customer and to have the customer's copy showing your terms and conditions delivered to the customer. To the extent that such a practice can be employed it is a most desirable one for a seller.

Your company's printed sales forms are carefully prepared, and frequently reviewed, to the end of attempting to insure protection for the company in terms and conditions of sale. In this connection, it must be realized that short cuts in the use of such forms or a failure to follow established procedures can result in there being no limiting terms and conditions in a given transaction which exposes the company to considerable risks. Moreover, at times customers will take specific exception to one or more of your terms and conditions, either in the order or acceptance form. In such instances, it is elemental prudence to have that matter resolved in writing before the sales transaction is completed, rather than to leave it to be resolved later in a lawsuit.

3. The Sherman Act. Section 1 of the Sherman Act says: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

That is all there is to the law that you have heard so much about. Now a contract, combination in the form of trust or otherwise, or conspiracy means nothing more than an agreement or understanding, oral or written. But not all agreements or understandings that in any way restrain trade are illegal. Early in the history of the law the *Standard Oil* case (1911) held that it only applied to unreasonable restraints of trade, and as the law developed it became clear that the court meant that indirect restraints which flow from a normal legitimate business transaction are reasonable restraints and hence legal, but that agreements or understandings which have for their main purpose the restraining of trade are unreasonable and hence illegal.

There is a rule of thumb which can be applied in testing nearly every agreement or understanding. It is this - if the agreement or understanding is made in the normal course of selling a company's products, then to the extent that it restrains commerce it is a reasonable restraint and not illegal. For example, an agreement with a dealer to supply him a carload of wallboard restrains trade in that no competitor can sell that car of wallboard to that dealer - yet that is a normal business contract, and the

restraint is merely an indirect and incidental one and not illegal. But if the agreement has for its principal purpose or effect the restraint of trade, then it is probably illegal. For example, an agreement with a dealer to resell the wallboard at a particular price. In other words, if you find that the underlying purpose is to restrain trade, then look out.

Certain types of agreements with competitors and with customers are clearly illegal under the Act, regardless of their purpose and effect. These include

(a) Agreements with competitors as to prices and terms and conditions of sale. Such agreements are clearly illegal. It makes no difference that the prices or terms and conditions of sale are considered fair or low or that they benefit the public. Motives have no bearing on that question.

(b) Agreements with competitors with respect to which customers shall be sold. Agreements with competitors to refrain from selling particular customers are unreasonable. The main purpose and effect of such agreements is to restrain trade.

Whether or not a refusal to sell a particular customer is simply an exercise of the company's right to choose its own customers or is by agreement with competitors depends upon the business setting in which the refusal takes place. It is not safe to rely simply on your right to choose your customers when your refusal to sell is made at a time when competitors also are refusing to sell the particular purchaser. Then all of the facts and circumstances surrounding your refusal to sell must be examined to determine that there is no business setting from which a court could infer an agreement.

(c) Agreements with competitors with respect to territories in which you or the competitor will sell. Each agreement of this type is clearly in restraint of trade. Almost every agreement with a competitor that has to do with prices or terms and conditions of sale or with customers to be sold or territories in which you or your customers will sell is illegal, because the restraint is direct and not the indirect effect of a legitimate agreement. All agreements with competitors must be entered into very carefully. The only safe policy is to have no agreements with competitors except such as are carefully considered and placed in writing after the legal problems are considered.

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(d) Agreements with dealers or other customers with respect to their resale prices or terms and conditions. Any agreement with a customer fixing his resale price is a violation of the Act. You have no right to fix by agreement or understanding the customer's resale prices or terms or conditions of sale. Particular care must be taken when dealing directly with architects and contractors where the products are ultimately sold to a dealer for resale to the contractor. If you quote a price to the contractor and then place the business through your regular dealer and require that he resell at the price you have fixed, then you have effectively controlled his resale price. When you have reached the point in your talk with the contractor where he has agreed to use your product, then the dealer should be brought into the transaction and make his own price. In situations of this kind it is easy to lapse into a method of doing business which amounts to controlling the dealer's resale price. Another situation that requires care in handling is in sales to jobbers of products which you also sell to the dealer trade in competition with the jobber. Naturally the company is interested that its jobbers do not undercut the company's dealer prices. But you have no right to require the jobber to respect your dealer prices and no right to require of him, as a condition of sale, that he observe your dealer prices. He must be free to make his own prices.

(e) Agreements with dealers or other customers not to sell to other dealer or customers. Courts have frequently held that an agreement with one customer not to sell another is an unreasonable restraint of trade. The right to choose your own customers does not give you the right to agree with a customer not to sell another. Sometimes the pressure to make such an agreement is compelling. Often the persons wanting such an agreement are your best customers in the market and the offending dealer who they want you to cut off is of little consequence by comparison. But if the dealers who want you to make such an agreement understand your reasons for not doing so, they can hold no ill will against either you or the company. In a large western city a few years ago you sold an aggressive dealer who was particularly annoying to the large dealers who belonged to the dealers' association. The association's representatives approached your district manager, nicely at first, not so nicely later, and finally with a threat to boycott your products unless you agreed to stop selling the offending dealer. If the district manager had agreed to stop selling the offending dealer, he would have made an illegal agreement for the company. The dealers' demand was refused, and the boycott began and was quite effective. But when the dealers' association was told of the company's legal reasons for refusing to make the agreement, they understood it, respected it, and the boycott was promptly called off. Similar situations arise throughout the country. In such a

USG 25762

case it is not only important to avoid making any such agreement but also to avoid circumstances from which a suspicious district attorney or a jury might infer that you had made an agreement. If you talk to the other dealers about the offending dealer and then stop selling him, there are grounds for suspicion that an agreement was reached, and even your most vociferous denials might not prevail. The only safe position to take is to stay out of the dealer scraps, because having no right to control them it is not only futile but also dangerous to become a part of them. If and when the time comes that the dealer scrap is affecting your position in the market and the total quantity of products you sell in that market, then is the time to decide deliberately which dealers to continue to sell. But it should be done without agreement or conversation with the dealers.

(f) Agreements with dealers or other customers confining their resale territories. Such agreements have been held to be illegal under the Sherman Act. Sometimes there is good business reason to want customers to confine their sales to their own trading areas. A dealer may have done a good sales job in his own bailiwick; he has advertised your products and promoted them to his and your benefit. He has good reason to believe you should protect him against the encroachment of a dealer outside the trading area. But you have no right to have an agreement or understanding with one dealer that he cannot sell in another dealer's territory. Here again conversation about the subject may only create a situation from which an inference can be drawn that an agreement exists. The only safe procedure is to have no conversation about it but when the proper time arrives make up your own mind whether to continue to sell the offending dealer.

It is important to avoid not only such express agreements or understandings but also circumstances from which an agreement can be inferred, for such agreements are commonly proved by inference from circumstances. The safe procedure is to stay out of situations with which you have no legitimate concern. You are only concerned when your business interests - the continued sale of the maximum quantity of products - comes into play. Then, having the right to select your customers, you can select those who will provide without agreement and without conversation the maximum sale of your products in the most efficient manner.

e. The Clayton Act. The Clayton Act (1914) was passed some years after the Sherman Act to supplement it and to catch possible violations of it in their incipiency, before they had actually become restraints of trade. There are three provisions of the Clayton Act which concern your day-to-day activities:

USG 25763

(a) Price Discrimination. This is Section 2(a) of the Clayton Act as it was amended in 1936 in the Robinson-Patman amendment. The primary purpose of this provision is to give competing customers equal prices and terms and conditions of sale except where there are differences in cost of manufacture, sale or delivery resulting from differing methods or quantities in which the products are sold or delivered, or where the lower price is made in good faith to meet the equally low price of a competitor. There is another purpose of Section 2, i.e. to give competing sellers (on the primary line of competition with USG) the benefit of USG's equal prices and terms and conditions of sale and freedom from USG pricing its products so low in their area as to cause them competitive harm. Stated another way, wherever you have prices or terms and conditions of sale which are different for one customer than for another, you have discriminated against one of them, and there are only three defenses to a claim that either a competing seller or a competing buyer has been harmed, (1) that the difference in price only reflects a difference in cost, (2) that the difference in price or terms and conditions of sale creates no competitive disadvantage against a customer or competitor, and (3) that the lower price or terms and conditions of sale was granted to meet a competitor's lower price.

Otherwise stated, a mere price difference, locally or in different areas, is a price discrimination within the meaning of Section 2, which can be defended against only on one of the three defenses mentioned.

Whether or not a difference in price can be justified on the basis of cost differences is an accounting problem. The Federal Trade Commission requires definite proof of a difference in cost, not just a guess.

There are many cases where a difference in price or terms and conditions of sale does not affect competition, hence the Act will not apply, insofar as competing buyers (your customers) are concerned. For example, if you are selling a product to dealers in Chicago and also to dealers in Omaha, if there is no competition between the dealers in those two cities there is no reason why your prices or terms and conditions of sale in such cities should be the same. However, if you have a difference in price or terms and conditions of sale between New York City dealers and Jersey City dealers, and there is competition between them, then no matter the extent of that competition the Act has been violated (unless the difference in price merely reflects a difference in cost). On the other hand, it must be recognized that territorial price differences, that would not affect your customers, may constitute a violation of the Act as regards your competitors, and particularly the smaller ones.

USG 25765

The same reasoning applies to sales to jobbers. Differences in price or terms and conditions of sale between jobbers and dealers creates no discrimination because jobbers and dealers do not compete. But sometimes a jobber is not only a jobber but also a dealer. Clearly when he functions in both capacities he can only be given the lower price or discount with respect to his jobbing sales. But what of the dealer who sets up and owns an independent jobbing company? Obviously, if the jobbing company is simply an agency of the dealer and he makes all or practically all of his sales to himself, the jobbing company is merely an agent of the dealer and is not entitled to a jobber discount. In such case the effect of granting the jobber prices or discount is simply to give the dealer a more favorable price than you are giving his competitor. What, then, of the dealer who owns a jobbing company which does a legitimate jobbing business, solicits sales from other dealers and yet resells some portion to the owners of the business - the dealer? If in such case the jobber is doing a legitimate jobber business and the sales to the owner dealer do not predominate and are made in the usual course of a jobbing business, the jobber is entitled to a jobber discount with respect to all of his sales. While the courts have not directly passed upon a situation of this kind, there would seem to be no good reason why ownership alone would prevent a jobber from being such with respect to sales to the common owner or parent. The question to determine is whether or not the jobber is really a jobber or simply an agency or instrumentality of the dealer. Obviously, many of these cases are difficult of decision. A decision to grant or withhold the jobber price or discount should be carefully reviewed in the light of all the facts.

The absence of adverse competitive effect, while a defense to price differences, has been held not to be a defense to the granting of advertising allowances or the furnishing of services and facilities on non-proportionally equal terms.

It is a defense to a violation of the Act that the seller makes a lower price or furnishes services or facilities in good faith to meet an equally low price of a competitor or services or facilities furnished by a competitor. This permits a seller to meet in whole or in part, but not to beat, an actual competitor's equally low price without having to extend that price to all other competing customers. Thus, it is permissible for the company to meet competitive situations as to price, policy, service, terms and conditions of sale either wholly or in part. The facts justifying such a meeting of competitive situations necessarily can only be obtained in the field from the trade. Pertinent facts should be recorded on appropriate forms for future reference.

USG 25766

Of course, this defense is applicable only so long as the competitor is continuing to offer the lower price or furnish better service or facilities. Therefore, when you meet a competitive situation of a repeating or continuing nature, as distinguished from such a situation involving a single order or specific job, a periodic check must be made in the field to determine factually that the competitive situation being met still exists. It is therefore important that competitive review questionnaires be promptly filled out and returned.

It is unlawful under Section 2(f) of the Act for a buyer knowingly to induce or receive a discriminatory price prohibited by the Act.

(b) Advertising and Other Allowances to Customers. Section 2(d) of the Clayton Act as amended also provides that it is unlawful to pay a customer for any services or facilities furnished by the customer in connection with the sale of a product unless the payment is available on proportionately equal terms to all other customers competing in the distribution of such products. Section 2(e) prohibits discrimination in the furnishing of services and facilities not accorded to competing purchasers on proportionately equal terms. Section 2(d) and 2(e) were specifically designed to regulate the granting of advertising allowances. It is significant that advertising allowances are not prohibited, but if they are granted they must be made available to all competing customers on proportionately equal terms. It is no defense to the granting of any allowance or service or facility on non-proportionately equal terms either that they were cost justified or that they caused no competitive injury. Therefore, the making of any payment or the granting of any allowance or service or facility to any customer which is not paid or granted to other customers requires the most careful consideration.

(c) Tying Clauses. Section 3 of the Clayton Act provides in substance that no sale or contract of sale may be made on condition that the customer will not deal in the goods, wares or merchandise of a competitor. This section outlaws three kinds of practices. The first type involves tying arrangements in which the sale or lease of a machine is conditioned on the consent of the buyer to use with it only supplies furnished by the seller or lessor. For example, a manufacturer of machines for packing plaster cannot require the purchaser to buy all of his bags from the seller of the machine. The second type arrangement precluded by Section 3 is so-called "full line forcing" or "tying-in selling." This section would prevent you from selling one product such as wallboard on condition that the purchaser also purchased other products, for example plaster, from your company.

U S G 25767

This does not mean, of course, that if you sell a customer wallboard that you cannot sell him plaster. It only means that you cannot attach as a condition to the sale of the wallboard a requirement that he purchase plaster. The customer is free to buy his plaster from you if he wishes, and you have every right to solicit his business so long as you do not make it a condition to the purchase of some other product. This section also precludes exclusive dealing arrangements where as a condition of doing business the seller (or lessor) demands that his customers would not handle his competitor's merchandise.

3. Miscellaneous. Naturally with as many different laws as there are pertaining to business transactions, a company of this size is frequently subjected to Government investigation. It has been the practice of the company to clear all such investigations through the Chicago office so that questions asked may be answered by someone who is in touch with all phases of the company's business. Only in this way can the company protect itself against the danger of Government investigators becoming only half informed or even misinformed. It is important, therefore, that if you are approached by a Government investigator and asked any questions regarding the company's business or for any papers dealing with the company's business, the investigator should be promptly referred to the proper person in the Chicago office.

- - - -

One final word of caution. This memorandum is stated in general terms. It is intended to be instructive and informational. It necessarily cannot set forth all of the qualifications and variations that may occur in given transactions. For that reason, it should not be relied upon in the determination of important questions. Rather such questions should be referred to the proper person in the Chicago office for more careful consideration.

(PRINTED IN U.S.A.)
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U S G 25768

GX-23

February 13, 1969

TO: All U.S.A. Corporate & Division Marketing Policy Personnel Listed Below:

FROM: #131-5 - Mr. A. J. Watt

SUBJECT: Questions from Competitors

Recently, the Supreme Court of the United States, in the case of Container Corporation of America, held that a practice of exchanging price information in the container industry violated Section 1 of the Sherman Act. It seems clear that the practices in the container industry are not practices which we have in any industry in which we are engaged.

Nevertheless, we have decided it would be prudent, until the situation is clarified, to avoid asking any competitor about his price, terms and conditions of sale in any particular market or to any particular customer, and also to refrain from answering any similar inquiries from competitors.

AJW/ks

A J Watt

DISTRIBUTION:

#145-1 - Mr. R. L. Wallace
#145 - Mr. H. J. Leonhardt
#145-2 - Mr. F. W. Weiser
#145-2 - Mr. B.H. Swenson
#145-3 - Mr. P. W. Splitteroff
#990-P - Mr. H. Q. Sabel
#980-P - Mr. J. P. O'Brien
#970-P - Mr. J. P. Colvin
#960-P - Mr. G. V. Lane

Mr. C. M. Price
Mr. J. G. Hiering

#141 - Mr. R. D. Stephan
#142 - Mr. F. E. Brockwell

Copy to:

#960 - Mr. G. R. Evans
#990 - Mr. K. E. Johnson
#980 - Mr. E. L. Busch
#970 - Mr. W. H. Waidman
#130 - Mr. J. B. Emmons
#140 - Mr. R. E. Schneider
#440 - Mr. C. M. Laube
#940-1 - Mr. F. E. Kupsky
#492 - Mr. R. H. Pickard
#950 - Mr. R. J. Lyman
#470-1 - Mr. C. C. Thiel

#480 - Mr. R. A. Heack
#340 - Mr. J. J. McVay
#184 - Mr. R. J. Croak
#978 - Mr. J. W. Lullo
#958 - Mr. R. F. Riddle
#968 - Mr. E. W. Marsh
#988 - Mr. R. A. Whitcomb
#146 - Mr. E. W. Duffy
#171 - Mr. J. R. Anderberg
#187 - Mr. W. R. Hogan
#166 - Mr. D. C. Wright

243287

UNITED STATES GYPSUM COMPANY

BEST COPY AVAILABLE

GX 29

~~Atlas~~
GX-29

October 25, 1968

To my knowledge, no one of you have been authorized by management to discuss prices with competition, but it is quite evident that some of you do this.

If you choose to do this, I would like to bring out the following precautions that should be taken.

Never say anything to any competitive employee indicating agreement.

That is, do not say "We will refrain from extending the extra 5% if you will."

Do not say "Well, if you are not trucking, we won't."

Do not say "We don't think you should be selling this type of account."

Be careful not to extend any price advantage to a customer without reasonable competitive information. There is always an urge to give an extra discount for a big order or for a favored customer. This cannot be done.

We know, and have proof, that some salesmen have asked customers if they would give us business if we could get them an extra

NG-A-61

discount. This is illegal, unless we make the same offer to everyone in that marketing area.

Be careful of any advantages you are tempted to give customers that are not competitive. In our anti-trust seminar we were told of a case where one company suffered because one of their salesmen gave some of his commission to a customer to get orders. This was proven to be discriminatory.

Do not write notes or letters to competitors' employees unless approved by Buffalo.

Refrain from making notations on files or notepads regarding your conversations with competitors' employees.

The question of keeping 100% Gold Bond customers competitive arises on occasion. If you truly have a 100% Gold Bond account, not a 90% or 80% account, whom you feel is at a disadvantage because we, the National Gypsum Company, have met competitive discounts with customers immediately in his area, you may, within your authority, on good faith, extend the same to the 100% Gold Bond account, but in such cases we would recommend you write these details in letter form to us.

Never discuss with any competitor's employee our intentions or

NG-A-62

what we plan to do, whether it is adding trucking service, increase price, decrease price, selling certain type of customers, etc.

Be sure there is practically no lag time involved in sending in the RTLC forms on price competitive situations you have met.

Do not attempt to instruct the plant on invoicing, even if the price met is within your guidelines.

You know Mr. Gustavus, as well as many others in our company, were called upon to give depositions in a current legal situation. The reason Mr. Gustavus was included was because he, at one time, was given the type of authority now being given to you. This means there is very little doubt in our mind that you could be deposed at some future date to explain your actions, so make sure you keep yourself legally clean.

N. H. Atwell

ch

GX-30A

GX 30A

Gold Bond

NATIONAL GYPSUM COMPANY

INTEROFFICE CORRESPONDENCE

Gold Bond

To J. P. Nicely
W. W. Gerber
F. R. Griffin
F. B. Phillips
G. N. Stewart
cc: E. E. Kroth
C. D. Webster
J. B. Woodmaker

Subject Legal Notes

Date October 28, 1969
From R. H. Atwell

After re-reading the legal advice I gave you, I would like to clarify one statement which I think is ambiguous.

First of all I made the statement that "to my knowledge, no one of you have had approval of Buffalo" to contact competitors' employees, and that if you "choose to continue this practice", of occasionally talking to competitors' employees, certain precautions should be taken.

This definitely should not be interpreted as approval to discuss anything with any competitor's employee.

The letter should have read that if you receive a phone call or unexpectedly meet a competitor's employee who talks to you and, if you choose to talk to them, rather than hang up the phone, or walk away from them, the precautions in my letter should apply.

R. H. Atwell

dh

NG-A-72

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GX 31

CEL

6211

April 12, 1968

TELETYPE 350 FORM

Marshall Goddard

cc: Marvin Greenwood
P. L. Courington
Richard Thompson

There seems to be some confusion in the district offices on the format of information needed for each of the various product lines. Also, I have seen some teletype requests that give such a small amount of information that a decision cannot be reached by the Product Manager without a further exchange of teletypes, phone calls, etc.

We have developed a format calling for the answers to 13 specific questions that will give the Product Manager the information needed to make a decision. It will be acceptable to all Product Managers for all products.

I think that the adoption of this format will help the district office since they will have only one check list rather than several.

It would seem to me that photo copies of the teletype could be made for all interested departments, such as the order department, and would eliminate the necessity of pasting the present teletype messages on to another form.

Attached are the questions that we need on teletype 350 forms and a specimen copy of typical teletype 350's on roofing and insulation board.

Possibly a typical 350 should also be prepared for gypsum board for the guidance of the district office.

If you have suggestions for improvement of this form, please bring them to my attention. If it seems satisfactory, please issue a bulletin of instruction to the district offices with copies to the Product Managers.

WDH/jl
Att.

W. D. Herbert

321997

K'T ok'd 7/68 with Mr. Goddard.

250-346 O - 77 - vol. 6 - 27

CEL 6212

Request for Price Exception No. _____ (Use consecutive numbers preceded by district code letter.)

To: _____ Tampa From: _____ (Manager) _____ (District)

1. Is this a New request; or does it Supplement or Supersede a previous exception. (Give number and date.)

2. Customer Name, Billing Address (City, *County, State) and Classification (Wholesaler, Dealer, Ni[illegible]ler)

3. Ship to destination: If same as billing address write "Same". If different give City, *County and State. Include name of job if applicable.

4. Size and type of shipment: (e.g. 80,000# C.L. 36,000# T.L.)

5. Total quantity involved in this request: e.g. "This CL shipment only" - "Total requirements" - "cars or trucks" or "5 TL's for this job only".

6. Shipping point.

7. Products and Prices requested: Be specific.

   Products: If entire product group affected, so state. If not, specify individual products.

   Prices: If net prices required, so indicate. If not give list price (price list number if applicable) less discounts or allowances. Specify whether freight or transportation charges are to be added or allowed.

8. Competitive Prices being offered: (State exact prices offered and by whom. Name competitors.

9. What proof or justification do you have to support this information. (Name person who furnished competitive information to us and how he received it.) (e.g. By phone from [illegible] competitor's salesman, etc.) Name of competitor's representative who available what is reason for believing information reported. (State whether you are forwarding Form 136.)

10. Recommended method of allowance - (e.g. Net prices on face of invoice, monthly credit, etc. Indicate who will originate credits.)

321998

11. What are total annual purchases by customer of like products ($ amount). What % Celotex now _____ What % if this request approved? _____

12. Date shipment required _____; Effective period _____ (State whether for a given period _____ e.g. 4th Quarter, 1967 - or "Until further notice".) If request is for specific shipments, give shipping period required.

13. District Order Number (if shipment pending)

* Required for Fiberboard Sheathing and Gypsum Products only.

CEL 6213

TO: H. A. Wooley, Tampa FROM: J. L. Allegood, Atlanta

THIS IS REQUEST FOR PRICE EXCEPTION NO. A 534

1. New Request
2. Central Supply of Virginia Inc., Andover, Virginia, Wise County To be set up as Jobber.
3. Same
4. Minimum Carloads
5. Total Requirements
6. Harrero
7. Fiberboard Tile and Layin Panels, and Bldg. Board - Jobber less 5%
8. Same
9. Mr. Odus Caudell, Pur. Agent told our G. R. Smith that he is buying on this basis from National Gypsum and has a continuing quote.
10. Face of Invoice
11. $60,000 total purchase - no Celotex now - would be 100% Celotex
12. Immediate Shipment for this order and until further notice
13. Order A 262 B

321999

CEL 6211

TO: R. L. MC MURRY, TAMPA

FROM: V. C. PULLEY, ST. LOUIS

REQUEST FOR PRICE EXCEPTION NO. R-162

1. Supersedes request No, R-115 of 6/26/67
2. White County Wholesale, Carmi, Illinois - Wholesaler
3. Same - plus branch at Belleville, Illinois
4. Maximum truckloads
5. Requirements
6. Chicago
7. Prepared Rfg. - Group "A" - Dlr List @600 less 5 & 5%
   Prepared Rfg. - Group "B", C, D" - Dlr List @600 less 5 & 3%
   Bar Fire Shingles - Current List of $9.90 plus frt. equal with Cincinnati
8. Same - Philip Carey
9. M. Davidson, Carey, District Manager quoted these prices yesterday to John Adams, of White County Wholesale. Mr. Adams phoned me information this morning and I believe him.
10. Net prices on face of invoice
11. $130,000 annually all roofing products - 60% - no change. Approval necessary to retain our share of business now split with Carey.
12. Week of November 20, 1967
13. Will place orders later this week.

322000

GEORGIA-PACIFIC

CONFIDENTIAL

INTERDEPARTMENTAL COMMUNICATION

DATE: February 3, 1971

TO: Branch Managers

LOCATION:

FROM: Larry Trammel

LOCATION: Dallas

SUBJECT: Gypsum Pricing Policy

It is our policy to invoice gypsum directs at the list price only.

Any substantiated "cost savings allowances" must be handled by Credit Memo.

Please see that this policy is observed.

L.T.

LT/dm

cc: Mr. Bill Brooks - Dallas

DOCUMENT No $ 11631
W. E. C. – 6/1/72

GX-33

GX 55

GEORGIA-PACIFIC

INTERDEPARTMENTAL COMMUNICATION

DATE March 19, 1971

TO Mr. Lawrence B. Trammel — LOCATION Dallas

FROM Stanley B. Dennisen — LOCATION Portland

SUBJECT Gypsum Invoicing

Larry, I know the policy of invoicing gypsum at nothing under list and then giving a credit memo for any functional discounts creates a lot of paper work. This has been discussed further with Glenn Wilson, and he still feels we should continue this at least through April. The point of all this is to do our best to maintain price strength so that we can benefit from this recent price increase.

How about setting your file over to the end of April and we will again discuss this to see if there is any purpose in continuing the present method.

Sincerely,

Stanley B. Dennisen

SBD:pj

bc: Mr. H. E. Sand (w/file)

COPY

DOCUMENT No. 11629
W.E.C. - 8/1/72

GX-34

GX 34

Gold Seal

NATIONAL GYPSUM COMPANY

INTEROFFICE CORRESPONDENCE

Gold Seal

To [illegible] Subject Sherman Lumber Company Springfield, Missouri Date April 23, 1970 From [illegible]

Dear Jack:

Attached is the request to meet competition that we discussed regarding Sherman Lumber Company whose General Offices are in Springfield, Missouri. Due to the fact that there is a considerable difference between the price that we are meeting for this customer and our published price, I do not want these prices to appear on the face of the invoice.

As we discussed, you will handle this with Mr. Atwell and he will handle this in his department through internal credit so that the prices shown will reflect in a monthly profit memo with itemized statement attached showing date of shipment, invoice number, and location for each of the Sherman yards. It is very important that you act this on and acknowledge it to me so that I know that it is being handled in the manner in which we have discussed.

Any deal previous that we have had with Sherman Lumber Company or Tolead Millworks, Inc. prior to 4/20/70 will be cancelled.

Tom H. Argent

To [illegible]

[illegible].

715589

GX-34

REQUEST TO MEET COMPETITION

DATE April 25, 1955

CUSTOMER'S NAME United Millworks, Inc. and Merriam Lumber Co., Springfield, Missouri.
Missouri yards: Springfield, Clinton, Sedalia, Joplin.

ADDRESS Kansas yards: Fort Scott, Parsons.

THIS IS A REQUEST TO BE COMPETITIVE WITH Tiajka Gypsum Co. and Acadia Gypsum Co. FROM _____ WHO OFFER MORE FAVORABLE TERMS THAN OURS AS FOLLOWS:

PRODUCT PURCHASED	Our Price	Competitive Price Paid or Quoted Per Unit	Latest Competitive Inv. No. and Shipping Date	Sale Terms and Discount (if any)	Date Shipped and Total Weight or Quantity Shipped
1/2" Gypsum Lath 3/8" Gypsum Lath 1/2" Gypsum Sheathing	Zone price less 8%	$41.50 35.50 38.50 29.50 8% off publ. zone price. Eff. 6/13/55.			

DESCRIBE FULLY ANY COMPETITIVE SERVICE OTHER THAN PRICE None

HAS THIS BEEN A CONTINUING PRICE OR PRACTICE ☒ YES ☐ NO IF YES — FOR HOW LONG Since 6/13/55.

WHAT IS BASIS AND PROOF OF THE ABOVE INFORMATION Prices read to T. F. agent by Bill Powell, president of Merriam Lumber Company on 4/20/55. Ken Pinks Mem. dated 4-12-55

HAS EVIDENCE BEEN SHOWN TO YOU YES ☐ NO IF YES — IN WHAT FORM

IS EVIDENCE AVAILABLE — ATTACH SAME

IS THIS COMPETITIVE ADVANTAGE SUBJECT TO ANY SPECIAL CONDITIONS ☐ YES ☐ NO IF YES — EXPLAIN

WHAT CLASS OF TRADE DOES COMPETITIVE SUPPLIER CONSIDER THIS CUSTOMER Retail lumber dealer and distributor.

IF CUSTOMER CLASSIFICATION INVOLVED, DOES THIS CUSTOMER'S METHOD OF OPERATION JUSTIFY SUCH CLASSIFICATION ☐ YES ☐ NO

IF INDUSTRIAL ACCOUNT — FROM WHICH MILL SHOULD WE SHIP?

IF SPECIFIC ORDER OR JOB INVOLVED, GIVE CUSTOMER'S ORDER NO. OR SALESMAN'S ORDER NO.

QUANTITY INVOLVED

WHAT IS YOUR RECOMMENDATION That we meet these competitive prices. Approval given by T. F. Agent to J. P. Lopez to meet this competition situation effective 4/20/55. Same price to exist at all points.

FOR BUFFALO USE ONLY

APPROVALS

TO BE HANDLED On face of invoice ☐ By C.M. memo ☐ Shipper

J. A. Durian

ECONOMICS

NG. 715590

GX-36

GX 36

Division Headquarters
April 25, 1955

M. A. Butler
St. Louis District

I approved the GX-3 to Lake Supply, which was forwarded to the St. Louis District yesterday.

I realize that you have requested that the prices be shown on the face of the invoice rather than issue a credit. I have declined to approve this since invoices have a tendency to be left around the Lake Supply Office. I would not like the lower prices to be seen by any one; and should this occur, it could precipitate a break in the St. Louis Market pricing. I have allowed a written credit to be issued rather than CRO, and it should be issued monthly so that Lake Supply can pay only the stipulated price.

If you have any questions concerning the above, please advise.

J. A. Durian

31721

GX-37

EX 37

Division Headquarters
December 3, 1967

J. R. McTaggart
Los Angeles Plant

SUPRO CORPORATION

This letter will confirm my telephone conversation regarding Supro Corporation - Pamona, California.

Effective 11-30-67 through 12-31, we will allow a credit of $3.00 per M on shipments to this account when the shipment is in 16000 lb. carloads. When the shipment is less than 13000 lbs. but more than 9000 lbs., then we will allow a 5% allowance on Wallboard Items. This policy will remain in effect until such time that the Asbco situation is resolved.

30749

You will note that a letter to the trade has been mailed reflecting a $2.25 per M increase effective 1-1-68. This would be on top of the '68 price, the current list price for southern California. Needless to say, competition will determine whether a price increase goes into effect January 1, as announced by G- .

I am not agreeable to placing the credit on the face of the invoice since this could undermine any price increase; and I am not completely certain that there is above reproach in reference to discussing pricing with our competitors.

Please submit a GMM-3 as this letter is not your authority, but merely an affirmation to an agreement.

J. A. Marian

JAM:ec

cc: A. L. Smith
Los Angeles Plant

U.M EXHIBIT 13F ITEM 51

GX-39

GOVERNMENT EXHIBIT 39

UNITED STATES GYPSUM COMPANY

SAN ANTONIO, TEXAS

January 23, 1963

Alfred D. Fruske
217 Halbart Drive
San Antonio, Texas

The following are price quotations on the French Quarter Apartments, San Antonio, Texas. Prices are F.O.B. Job and placed in the individual units.

		SAN ANTONIO DEALER PRICE
1/2" Sheetrock	$50.52 MSF	49.00
5/8" Plain Core Sheetrock	$62.33 MSF	60.80

Joint Cement and Tape requirements (1 Truck Load) are included in this quotation and price will be adjusted to meet competitive prices quoted.

Prices herein quoted are subject to entire job requirements.

(Retyped from a handwritten note)

Ross C. Stamper
United States Gypsum Co.

Questions

1. Presume Fruske is a contractor. Is this a new policy - USG quoting direct to contractor, providing job site delivery, specific job placement?

2. If to be handled thru a dealer. Markup appears very small for unloading, trucking to job, placing in indiv. units, and profit?

3. Terms of quotation?

Net Price

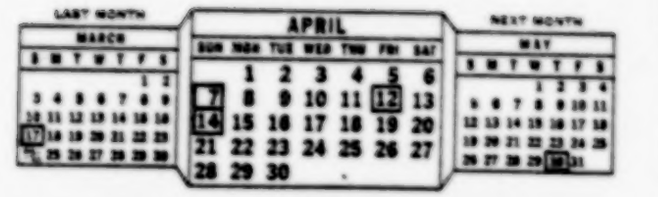
ALM 2/19

029498

~~[illegible]~~
GX-39

Conf Bdt 2/14
~~[illegible]~~
~~[illegible]~~ Okay
McCall
For your information.
Please route to
R Sikes —
Bdt please relay
to K attached for
FBI Brandt information.
Handled
Kay

~~[illegible]~~
GX-39



GX-40

GX40

Bestwall Gypsum Company

FOR Paoli General Sales DATE May 19, 1965 FROM Detroit Sales OFFICE

ATTENTION OF Mr. R. Sikes SUBJECT COMPETITIVE PRICING

ANSWERING YOURS DICTATED BY D. A. Marsh - jp

cc: Mr. A. L. Mayer - Paoli
Mr. K. A. McCaskill - Paoli
Mr. P. D. Johnson - Area Sales Mgr.

I am quoting a report from our Mansfield representative, Bob Walters, which shows very clearly how prices can very quickly deteriorate. In this instance a foolish Johns-Manville representative has cut the price unnecessarily and has resulted in disseminating this cut price information to all the dealers in four counties in the state of Ohio.

"Today I talked to George Halbeig, owner of Breithaupt Lumber Company, Dresden, Ohio. He told me that he had been buying about 3 to 4 loads of gypsum each year and had been buying from U.S.G. with no discounts. Last month Sam Gaits, the J-M representative, offered him three 5's on a load. Halbeig purchased one load, then took his invoice to the Ohio Retail Lumber Dealers meeting (District #12) to show all the other dealers. District #12 covers the area of Licking County, Muskingum County, Fairfield County and Coshocton County.

Just wanted to let you know for now."

113420

Called J/M - He will discuss with S/m

RECEIVED
GENERAL SALES - GYPSUM
MAY 21 1965
BESTWALL GYPSUM COMPANY

4576

DOCUMENT NO. 5
W.E.C. - 6/1/72

GX-41

GEORGIA-PACIFIC

INTERDEPARTMENTAL COMMUNICATION

DATE January 6, 1966

TO Mr. R. Sikes

LOCATION Paoli

FROM Mr. P. J. Kowal

LOCATION Southwest Region

SUBJECT Alamo Supply Company
San Antonio, Texas

The following will confirm our telephone conversation today. I am attaching a December 18th price list indicating less than truck load quantities available of USG sheetrock at $.50 over a full truckload published prices with Bestwall. While I understand that this can be possible because the dealer has bought heavily before the price advance, I feel that a continuation of these weekly price lists will have an adverse effect on the market. Historically, this company has maintained the same policy through the successive price declines of the past two years. By creating this inequity in the market place, other gypsum companies have had to successively position people they are doing business with in order to share in the business. From all indications our other markets have all advanced on retail pricing with the exception of the El Paso market. Cashway Lumber Company, a USG account, has bought very heavily and is continuing the old prices right on through the month of January.

In any event, we will be watching both the situations in the next few weeks to note if it causes any market repercussions.

Regards.

PJK/ml

RECEIVED
GENERAL SALES - GYPSUM

237

1037

DOCUMENT NO. 5
W.E.C. - 6/1/72

GX-41

OPEN
7:30 to 5
Sat to 12

ALAMO SUPPLY

322 Dawson Street
San Antonio, Texas 78208

Cash and Carry Building Materials

WHOLESALE ONLY

Phone: CA 5-5895

PREMIUM QUALITY

we will be closed Fri. & Sat., Dec. 24th & 25th as it is our understanding that the majority of the dealers will also be closed.

December 18, 1965

PINE Std & Btr	8'	10'	12'	14'	16'	18'	20'	22'	24'
2x4 Price per M	93.50	98.50	98.50	99.50	109.50	109.50	109.50	119.50	119.50
2x6 Price per M	88.50	98.50	98.50	98.50	109.50	109.50	109.50	123.50	123.50
2x8 Price per M	99.50	99.50	105.50	105.50	105.50	109.50	109.50	126.50	126.50
2x10 Price per M	109.50	109.50	109.50	109.50	109.50	115.50	115.50	126.50	126.50
2x12 Price per M	109.50	109.50	109.50	109.50	109.50	115.50	115.50	126.50	126.50
4x4 Std & Btr Fir	116.50	116.50	116.50	116.50	116.50	116.50	116.50		
1x4 KD #3 & Btr Fir	84.50	87.50	85.50	85.50	85.50	87.50	Select for Uppers		
1x10 & 1x12 Lap & Gap Cedar			129.50	1x10 DOLLY VARDEN CEDAR SDG 129.50					
1x6 ROUGH CEDAR			115.50						
1x12 ROUGH CEDAR			129.50	1x12 #3 PONDEROSA PINE 98.00					

YELLOW PINE DIMENSION MILLBRITE TREATED

2x4 1500# KD SPIB #2	99.50	99.50	99.50	99.50	99.50	99.50	99.50	142.50	142.50
2x6 KD SPIB #2	89.50	89.50	89.50	89.50	89.50	89.50	89.50	142.50	142.50
2x8 KD SPIB #2	89.50	89.50	89.50	89.50	89.50	89.50	89.50	142.50	142.50
2x10 KD SPIB #2	99.50	99.50	99.50	99.50	99.50	99.50	99.50	152.50	152.50
2x12 KD SPIB #2	104.50	104.50	104.50	104.50	104.50	104.50	104.50	162.50	162.50

YELLOW PINE KD Appox 2m'/Pkg. Price Per M	1x6 #2 S4S 98.50	1x8 #2 S4S 96.50	1x6 RGH #2 S2E 92.50	1x6 CP #2 89.50	1x8 SW #2CM 89.50	1x8 SL #2 98.50	1x8 #2 105 Sdg 98.50	1x8 S/P 105 Sdg. 128.50	1x6 C/P #3 75.50

OAK FLOORING-The very best! Approx 1M'/Pkg 25/32x2 1/2

Grade	ClrWO	SelWO	#1WO	#2WO	ClrRO
Price Per M	225.00	220.00	198.00	122.50	235.00

SHEETROCK "USG"	2x8-½	4x8-¼	4x8-½	4x8-3/8	4x8-¾	4x12-½	4x8-5/8
Pcs. Per Pkg.	CS 120	120	120	80	60	40	48
Prices Per M	37.50	29.00	25.00	31.50	37.00	37.00	44.00

No pcs per Pkgs
2x4-8'& Shtr 240
2x4-10'-24' 120
2x6-8' -24' 80
2x8-8' -24' 60
2x10-8'-24' 50
2x12-8'-24' 40

PLYWOOD CALL US FOR PRICES ON SANDED

INSULATED SHEATHING ASPHALT IMPREGNATED.. 39.50 M'

DIKTAK (4x8-½-90 pcs per pkg) Wall Board. 88.50 M'

MANY AMOUNT SPECIALS

FELT 15#30 lb. ..(per rl)..... 1.65

CEDAR SHINGLES Certigrade #1 Perf.18" Market Price

CEDAR SHAKES Heavies 3/4-5/4x24".. Market Price

RS & RS

YELLOW PINE STUDS
Stud & Btr Grade
PET 92 5/8"or 96"
KILN DRIED

93.50

NAILS

	per C
A Can	1.45
B Can	8.05
10 Can	7.95
5 Box	8.55
10 Box	8.40
5 Case	8.05

THIS WEEKS SPECIAL

KD-CHENEY STUDS

3.00 per C
2.50 per C

PREMIUM QUALITY
92 5/8" or 96" PET

033657

Alamo Supply CA 5 5895 December 18, 1965

GX-41

OPEN
7:30 to 5
Sat. to 12

ALAMO SUPPLY

JAN 21 1966

322 Dawson Street
San Antonio, Texas 78208

Cash and Carry Building Materials

WHOLESALE ONLY

January 15, 1966

PINE Std & Btr	8'	10'	12'	14'	16'	18'	20'	22'	24'
2x4 Price per M	93.50	98.50	98.50	99.50	109.50	109.50	109.50	119.50	119.50
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1x6 ROUGH CEDAR			115.50						
1x12 ROUGH CEDAR			129.50	1x12 #3 PONDEROSA PINE 98.00					

NEW WESTERN RED CEDAR.
Stock 2x4 Std + Btr
4x4 " "

ALL PURPOSE CEMENT.....(25 lb).....	88. -ea-	1.65	1.55
PERFA-TAPE.....(250')	-ea-	.52	.46

"GOLD BOND" WOODROCK SIDING Primed 3/8x12"-12' 202.50 per M

K.D. YELLOW PINE - MILLBRITE - SPIB

2x4 1500# KD SPIB #2	93.50	93.50	93.50	93.50	93.50	93.50	93.50	142.50	142.50
2x6 KD SPIB #2	93.50	93.50	93.50	93.50	93.50	93.50	93.50	142.50	142.50
2x8 KD SPIB #2	93.50	93.50	93.50	93.50	93.50	93.50	93.50	142.50	142.50
2x10 KD SPIB #2	103.50	103.50	103.50	103.50	103.50	103.50	103.50	152.50	152.50
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YELLOW PINE KD Apox 2m'/Pkg. Price Per M	1x6 #2 S4S 98.50	1x8 #2 S4S 98.50	1x6 RGH #2 S2E 94.50	1x6 CP #2 89.50	1x8 SW #2CM 89.50	1x8 SL #2 98.50	1x8 #2 105 Sdg 99.50	1x8S1 & Btr 105 Sdg. 128.50	1x6 C/P #3 75.50

OAK FLOORING-The very best! Approx 1M'/Pkg 25/32x2 1/2

Grade	ClrWO	SelWO	#1WO	#2WO	ClrRO
Price Per M	233.00	228.00	200.00	129.50	245.00

SHEETROCK "USG"	2x8-½	4x8-¼	4x8-½	4x8-3/8	4x8-¾	4x12-½	4x8-5/8
Pcs. Per Pkg.	CS 120	120	120	80	60	40	48
Prices Per M	37.50	25.00	25.00	31.50	37.00	37.00	44.00

No pcs per Pkgs
2x4-8'& Shtr 240
2x4-10'-24' 120
2x6-8' -24' 80
2x8-8' -24' 60
2x10-8'-24' 50
2x12-8'-24' 40

PLYWOOD CALL US FOR PRICES ON SANDED

INSULATED SHEATHING ASPHALT IMPREGNATED.. 39.50 M'

DIKTAK (4x8-½-90 pcs per pkg) Wall Board. 88.50 M'

MANY AMOUNT SPECIALS

FELT 15#30 lb. ..(per rl)..... 1.65

CEDAR SHINGLES Certigrade #1 Perf.18" Market Price

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YELLOW PINE STUDS
PET 92 5/8"or 96"
KILN DRIED
SPIB-STUD-GRADE
93.50

NAILS

	per C
A Can	1.45
B Can	8.05
10 Can	7.95
5 Box	8.55
10 Box	8.40
5 Case	8.05

#98884

January 15, 1966

250-146 O - 77 - vol. 4 - 25

GX-48

GPBW DALLAS

GPBW PAOLI
3/2/66

DALLAS TO C R BOONE FM R SIKES PAOLI

WIRE ME TODAY PRICING STRUCTURE OF OKLA CITY BRANCH ON OUT OF WAREHOUSE SALES OF GYPSUM BOARD PRODUCTS.

END OF MESSAGE

033635

GX-48

[redacted]
61-49

Called KR 3/2/66

GPBW PAOLI

GPBW DALLAS
FROM RICHARD BOONE TO BOB SIKES MAR 2 1966
RE OKLA CITY BRANCH PRICE STRUCTURE PRICES ARE 3.00 OVER OUR PUBLISHED CARLOAD PRICE OF 39.00 PER MSF ON PICKUPS OF 1/2 BOARD 1/2 DELIVERED TO A DEALER WHO HAS A FORKLIFT THE PRICE IS 44.00 IF THE DEALER DOES NOT HAVE A FORKLIFT THE PRICE WOULD BE 46.00 ALL OTHER ITEMS SAME BASIS
END

033634

[redacted]
61-61

JOHN PORTER - ST LOUIS FROM R SIKES

[redacted] USG, CELOTEX BRAND GX61
RAPIDS & HILT HAVE PRICE DEVIATIONS IN INDIANAPOLIS.

GPBW PAOLI
cc: JOHN BOETZE - CHICAGO SALES

GPBW ST.L
6/20/66
TO R. SIKES FM J. W. PORTER

WE HAVE REPORT THAT USG NET CELOTEX AND NET GRAND RAPIDS ON BOARD IN INDIANAPOLIS MARKET. UNDERSTAND DEVIATION TO BE $1.50 MSF. AS OF THIS TIME CENTRAL BLDG. MATERIALS HANDLES CELOTEX 108 AND USG 908 --- DORFELL CO. HANDLES CELOTEX 908 AND FLINTKOTE 508 --- IF THIS REPORT IS ACCURATE, NEED AUTHORIZATION TO POSITION OUR ACCOUNT. ATTITUDE-HENCE SUPPLY. PLEASE ADVISE. THANK YOU GA ON END
END PAOLI

NO!!
(1) (4) x5 (8)

DOCUMENT NO. $ 3514
W. E. C. – 8/1/72

[redacted]
GS-73

[redacted] 7/14 [redacted]

[redacted] ATLANTA [redacted] R SIKES

WE HAVE REPORTS THAT SAVANNAH BRANCH IS SELLING [redacted] BOARD OUT OF WAREHOUSE AT [redacted] $1.24 PER MSF ABOVE DEALER COST. THIS IS CONTRARY TO NEW PRICING STRUCTURE OF 5% ABOVE DEALER COST. CASE IN POINT IS DOUB PLY LBR CO.

~~[redacted] PROBLEM TODAY~~

[redacted]
GS-73

Alex tells me that Mr. Dennison has approved [redacted] the publication of a 590 rack of over c/c for pick up.

unless there are severe competitive conditions from another wholesaler forcing a deviation from this published price this action will probably force Natl Gypsum who has plant in Savannah to police this decision with dreamt -

Please review this immediately with Steve Dennison & advise me by tomorrow sure.

GX-73

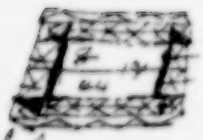
(1) 55% calls [illegible] army -
Atlanta + seaboard -
publication prices out [illegible]
weeks. New prices 6.95
warehouse To Dealer only.
are c/c list + 5%.

(2) can not explain to Fayette.
as they are selling to both
Dealers + Builders + Affiliates -
However they have not granted
c/c price privileges at warehouse
to anyone. Consequently the
dealer is contacting their
mill sale (c/c) solicitation
as F.O.B. warehouse -
What is dealer name? [illegible]

(3) What is [illegible]
[illegible]?

0509 [illegible]

GX-73



K Cutoff
Statesway
Atlanta - 50° above deck-price to dealer.
Dealer none ?
1½" min
5%
Seaboard - 2½" 5% → 8 @ 5½" - 3 @ 6½"
Pickup at 40,000 c/c price - any amount
Doing daily thru Co - 4/5 prices
for Fayette -

Terms → terms

Dealer

Clarence Carter on strike -
Atlanta -
15 tons last plaster now } as received or
+ 15 tons later. } B/W bags.

0509 [illegible]

BEST COPY AVAILABLE

GX-75

3-39.24 - 1.24 up to 8 Realm only

Will Buy to meet Competition up to 40.00

GA PAC ATL

7/14/66

ATLANTA TO S. J. SCHUERMAN FM R. SIKES PAOLI

WE HAVE REPORTS THAT SAVANNAH BRANCH IS SELLING BOARD OUT OF WAREHOUSE AS AT $1.24 PER MSF ABOVE DEALER COST. THIS IS CONTRARY TO NEW PPICING STR STRUCTURE OF $2 ABOVE DEALER COST. CASE IN POINT IS DOUG ASHY LPR. CO.

ALEX TELLS ME THAT MR. DENNISON HAS ASSURED US OF THE PUBLICATION OF A $2MARK UP OVER CARLOAD FOR PICKUPS.

UNLES THERE ARE SEVERE COMPETITIVE CONDITIONS FROM ANOTHER WHOLESALER FORCING A DEVIATION FROM THIS PUBLISHED PRICE, THIS ACTION WILL PROBABLY FORCE NATIONAL GYPSUM WHO HAS PLANT IN SAVANNAH TO POSITION THEIF DEALERS WITH DISCOUNTS.

PLEASE REVIEW THIS IMMEDIATELY WITH STAN DENNISON AND ADVISE ME BY TOMORROW SURE.

GA OR END

GA PAC ATL

050423

GX-76

ROUTE SLIP

GEORGIA-PACIFIC

TO: ALA

I have watch this & see the reaction we should have a recommendation from Bill as to the extent Don desires to push legal

REMARKS OR INSTRUCTIONS 7/15/66 - nothing

☐ PLEASE HANDLE TO CONCLUSION. Then a talk

☐ PLEASE READ AND LET ME HAVE YOUR COMMENTS. about all

☐ PLEASE READ AND RETURN. the letter

☐ FOR YOUR FILES.

☐ FOR YOUR APPROVAL.

Bill Sikes might give you a pretty good reading on what Reaction -

FROM

GPR PAOLI

GPRW SLCUTAH

TO MR A L MEYER - M POWERS FROM - S HOLE - WESTERN REGION -1 5

HAVE RECENTLY SENT IN REPORTS THAT AMERICAN AND THEN CELOTEX DEALERS WERE ADVERTISING IN SEATTLE PAPERS INDIVIDUAL PCS. OF 4XB' 1/2" GYPSUM WALLBOARD FOR $1.61 A SHEET. ON 7-7-66 AID WASHINGTON - CASH-WAY LUMBER ADVERTISED U.S. GYPSUM SHEET ROCK AT $1.6 A SHEET AL 50. THIS AMOUNTS TO $50.31 PER THOUSAND SQUARE FEET COMPARED TO A DEALER COST OF $50.50.

GA OR END9

230 188

1072

DOCUMENT NO. 5

W. E. C. — 6/1/72

BEST COPY AVAILABLE

GX-78

Celotex (Cody)

Plywood Supply
Seattle

2 Tr deal by Y/m

Pay'd Rad Stores
Advertising @ Very
Small Mark-up
our dealer price.
Compared Celotex all the Tr.
Shyder Corp Tr. NO DEALS OF ANY KIND IN USA 9/9

NC!

GX-78

ACTION MEMO

Subject
☐ See attached

- ☐ For Your APPROVAL
- ☐ For Your COMMENT
- ☐ Advise COMPLETION Date
- ☐ CONTACT Me About This
- ☐ Per ☐ Our ☐ Your CONVERSATION
- ☐ For DISCUSSION
- ☐ Prepare ESTIMATE
- ☐ For Your FILE
- ☐ For FOLLOW-UP Record
- ☐ Please HANDLE
- ☐ For Your INFORMATION
- ☐ INVESTIGATE And Report
- ☐ READ ☐ Destroy ☐ Return
- ☐ Per Your REQUEST
- ☐ Advise STATUS

TO: K.G. McCrosket
A J Meyer

FROM: W. J Mole

DATE: 9-9-66

RETURN BY:

FORWARD TO:

☐ I sent rate attached also our price
Weekly Market Letter ending 9-9-66

DOCUMENT NO. S 1075
W.E.C. – 8/1/72

DOCUMENT NO. S 1075

GX-87

F. D.

1. Lumpkin is "mad" about our Black operations - since he has lost some Customers.

2. Celotex has No DEAC of any kind

3. Melle thinks Lumpkin is sore enough to sell @ 42.00 and even only Cash disc but he would not sell below Cost 033508 Chas 9/26

GX-97

GI-97

GI-98

December 1, 1966

Mr. J. J. Castevens — Charlotte

A. L. Meyer — Paoli

A short time ago my attention was called to the fact that a Salesman in your region had made some quotations on G/P letterhead to contractors on behalf of dealer customers, apparently for material on a specific job although the name of the job was not shown. These quotations involved both job site deliveries of gypsum products (presumably by dealers) and pickup f.o.b. cars at G/P warehouse.

I gave the details of a specific instance to Louis Kaboos and I believe he has checked and found several others. If you need this information you can get it from him, however, my point in writing to you is to enlist your cooperation in discontinuing this practice for it has a tendency to lead to numerous complications in the market place. The best practice is to have the dealer make the quotation himself. If our Salesman finds it necessary to make a quotation on behalf of a dealer customer he should do it verbally and then get the dealer to confirm it in writing on his own stationery direct to the prospective buyer. Experience has shown this to be a wise policy.

Thanks for your help.

ALM/sh — A. L. M.

CC:
Mr. L. Kaboos - Charlotte

GX-104

GEORGIA-PACIFIC

GX 104

INTER-DEPARTMENTAL COMMUNICATION

DATE: January 17, 1957

TO: Mr. P. J. Koval

LOCATION: Southwest Region

FROM: A. L. Mayer

LOCATION: Paoli

SUBJECT: NEW ORLEANS MARKET

RE: Competitive Situation Referred to in Weekly Market Letter

This will acknowledge and thank you for the information in and attached to your memo of January 10th.

You asked for our comments and I think what you had in mind was particularly comments relative to Wayne Nunes' report of December 28th having to do with alleged advertising allowances by U. S. G. and National. The U. S. G. representative may have indicated the possibility of getting such an allowance with the hope that he would go back to his manager and endeavor to sell it. However, we are absolutely certain that such an arrangement would not be approved by the home office. I think the same would be true of National Gypsum Company. The representative may have been led to believe by the customer that he was offered and could get an allowance from U. S. G. and the natural reaction of the Salesman would be that "If they do it we will do it", but he would have to get approval from the home office before the commitment would be valid. I have every reason to believe that such approval would not be given.

Most of the other competitive items mentioned have to do with Clerks competition and, as you know, at the present time we are not choosing to meet this competition.

Please continue to send us any competitive information that you pick up in the field regardless of whether or not we have indicated to you that we will not meet it. Field intelligence is the only means we have of keeping informed of what is going on in the market.

ALM/bh

A. L. M.

CC:
Mr. K. A. McCambill - Paoli
Mr. H. H. Powers - Paoli

232

Resp # 2(g)

GX-107

THE CARPENTERS' STRIKE. -OUTSIDE OF THIS AREA, BUSINESS WILL BE ABOUT THE SAME.

COMPETITIVE ACTIVITY

J. M. IS SELLING FOUR FOOT WIDE LATH AT LATH PRICES - WHERE WE HAVE BEEN GETTING THE DENS COTE BASE PRICE. IT APPEARS WE WILL HAVE TO MEET IT ON OCCASIONS.

Not so - This is a Rebco policy (off and on) to obtain business. J.M. admitted readily that their "old" Rebco personnel were quoting on this basis but the practice has been stopped. F 2-21-57

SHIPMENTS AND QUALITY

SHIPMENTS ARE THE SAME. QUALITY OUT OF LOVELL HAS IMPROVED. SIGURD QUALITY IS GOOD.

END. GA PLSP

DOCUMENT NO. 9452

GX-110

Bestwall Gypsum Company

FOR Paoli General Sales DATE June 26, 1964 FROM Detroit Sales OFFICE

ATTENTION OF Mr. R. Sikes SUBJECT THE CELOTEX COMPANY

ANSWERING YOURS DICTATED BY D. A. Marsh - jp

cc: Mr. W. F. Rust - Detroit S/R
Mr. J. R. Ryan - Detroit Sales

Bill Rust phoned me today (Thursday, June 25th) that he had visited the John Meller Company in Cincinnati and found two truckloads of Celotex board which had arrived simultaneously. As you know, deliveries in the Cincinnati area are supposed to be limited to rail shipments.

Bill tells us that the Celotex salesman informs all of their customers that they will never let them run out of board and rather than do this they will ship them truck loads any time it is necessary to get material to them promptly.

RECEIVED
GENERAL SALES - GYPSUM
JUN 29 1964
BESTWALL GYPSUM COMPANY

Spec Flat
one shipping
one time deal.

DOCUMENT NO. 5 7101
W. P. E. - 8/1/72

GX-112

Dallas ref

INQUIRY FROM (1) T.O.B. 1/11/66

GED PAC OC

GPSW PAOLI
1/11/66

OKLAHOMA CITY TO R. FAVORS FM PAOLI

'S GEORGIA PACIFIC PERMITTING T/L PICKUPS GYPSUM BOARD FOR MEL CRANE
APTS., OKLAHOMA CITY AT CARLOAD PRICE?

G.P. OKLA CITY RECEIVED 1/11/66
" WE ACE INSULATION C/L PRICE PLUS $.25 PER
M SQ FT FOR THIS DEAL ONLY ON TRUCK DUMPS.
USUAL MARKUP IS $3.00 OVER C/L PRICE"

GX-113

K.A.M. ———
ALM ———

MESSAGE FROM HOLE 2/14/66

COMPETITION:
NATIONAL GYPSUM CO
NATIONAL S/R DON JOHNSON
NATIONAL DEALERS- KON-MAX
HAYFIELD FEED & GRAIN
SALT LAKE CITY

NATIONAL SHIPS 90M CARS TO SALT LAKE CITY AT REGULAR DEALER PRICE OR $40.70 ON 5"BD.

HAYFIELD FEED & GRAIN IS SOLICITING 25,000 FT T/L ORDERS (50M LBS) FROM SOUTHERN UTAH DEALERS AT $41.70 ORA MARKUP OF ONLY $600 PER MSQFT ABOVE SALT LAKE DEALER COST AND ARE HAULING DISTANCES OF 300 TO 350 MILES. WE ARE RAPIDLY LOSING SOUTHERN UTAH BUSINESS BECAUSE MANY OF THE DEALERS DO NOT HAVE RAIL SIDING AND PREFER TRUCKLOADS

HOLE STATES THAT HE MUST HAVE AN UNLOADING ALLOWANCE IN ORDER TO COMPETE OTHERWISE, WE WILL LOSE SOUTHERN UTAH BUSINESS.

HOLE WANTS AN ANSWER TODAY

033403

GX-114

R.C.L.

[illegible] Do you know this [illegible] about this?

033403

BEST COPY AVAILABLE

GX-115

SPL. PAOLI
I-XXXX2-14-66

GPBW SLCUTAH
TO MR MC CASKILL FROM W S MOLE

THE FOLLOWING IS AN ADDITION TO THE PREVIOUS TWX

[illegible] OF SOUTHERN UTAH DEALERS NOT I[illegible] THEY HAVE RADIO GO TO CEDAR CITY TO TAKE CARLOAD SHIPMENTS- NATIONAL'S TRUCKS ARE WELCOME TO DEALERS A[illegible] TO TRUCKS. THIS WILL BE EXPENSIVE TO US.
GA GP END

END PAOLI

X

116654

DOCUMENT No. 5 6864
W.E.C. – 6/1/72

GX-119

GEORGIA-PACIFIC

INTERDEPARTMENTAL COMMUNICATION

DATE May 25, 1966

TO Mr. R. Hilts

LOCATION Paoli General Sales

FROM Mrs. N. Kosielniak

LOCATION Detroit Sales

SUBJECT DISTRIBUTION CENTER
Cleveland, Ohio

Re: G-P Invoice #01311
Mack's, Inc.
Valley City, Ohio

Answering your letter of May 17th to Mr. Hilts.

We have contacted Cleveland Distribution Division for a copy of subject invoice. Also made an attempt to discuss the stop-over charge with Mr. Halter but he is out of town until 5/30.

Discussed the situation briefly with Ron Kubicek, who is familiar with Mack's billing.

This particular shipment was a stop-over with Cobb Lumber Co., Oberlin, Ohio and the complete stop-over charge was billed on Cobb's portion both by Bestwall to Georgia Pacific and then Georgia Pacific to Cobbs. (Mr. Halter asked that we bill the full stop-over charge on Cobbs portion.)

The order clerk has now been instructed that stop-over charges must be split between the two participants when billed at the zone delivered truckload price.

We will review this file with Mr. Halter next week.

NK:jls

cc: Mr. R. W. Hilts - Cleveland
Mr. T. A. Halter - Cleveland D/D

RECEIVED
GENERAL SALES - GYPSUM
MAY 27 1966
BESTWALL GYPSUM COMPANY

050173

GX-119

May 17, 1966

Mr. R. W. Mills — Cleveland Region

R. Sikes — Paoli

DISTRIBUTION CENTER
CLEVELAND, OHIO

Re: G-P Invoice #01911 -
Nacks Inc.
Valley City, Ohio

It has been called to my attention that the above G-P invoice covering 12,500 sq. ft. of Gypsum Board as one portion of a stopover truck and billed at the truckload price, did not include the stopover charge.

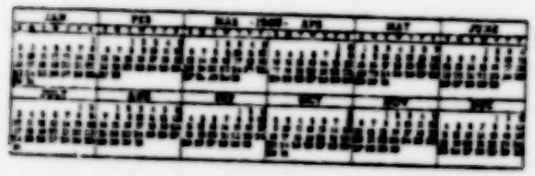
Will you please discuss this matter with the Cleveland Branch and inform them that in such cases where we invoice the customer on their portion of the stopover truck at the 20 ton truckload price, the stopover charges must be split between the two participants and shown on the invoice.

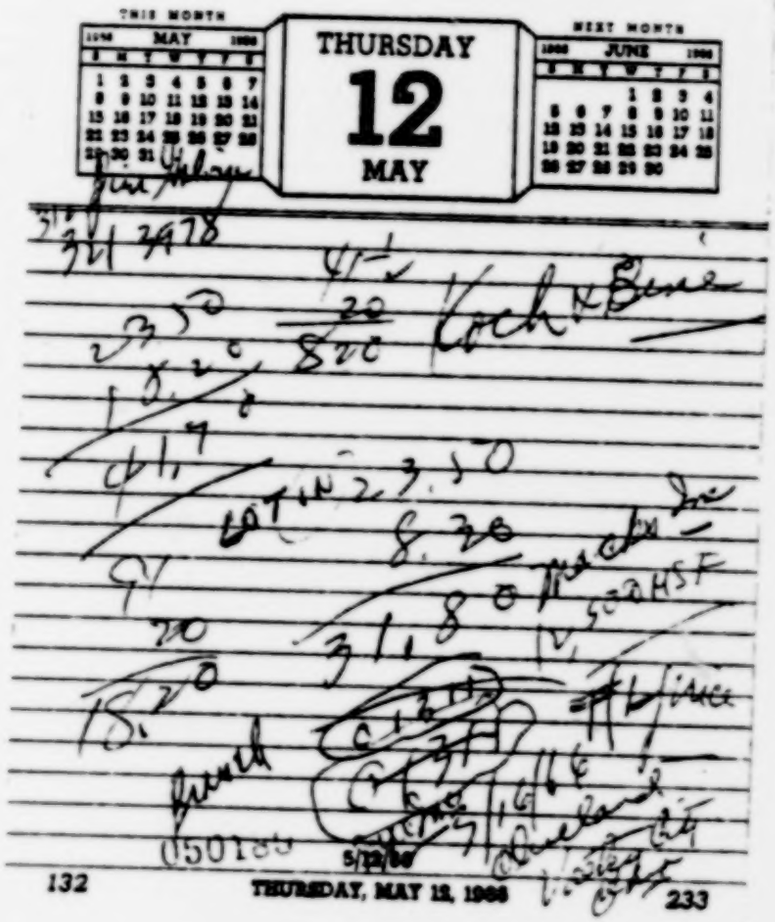
As soon as you have handled this matter, please let me know.

R. S.

RS/dcf

GX-119





GX-121

J. A. STRANSKY - # L.A. 147-21
C. O. FUTTERER - # L.A. 121-4

COMMENTS:
Return to me with your written report.

Ordered 12/21/54

FROM: C. V. LANE
L.A. 147-21

MERCHANDISE MANAGER
WESTERN REGION

Q-12-1450

50A

GX-121

INTRA-COMPANY ROUTING SLIP

TO G. V. Lane
(DEPT. NO., DIST. OFFICE OR PLANT)

ATTN.

FROM Futterer

DATE 12/3

☐ NOTE AND FILE
☐ NOTE AND RETURN
☐ NOTE AND SEE ME
☐ INVESTIGATE AND REPORT
☐ TAKE APPROPRIATE ACTION
☐ PLEASE ANSWER
☐ FOR YOUR APPROVAL
☐ FOR YOUR INFORMATION
☐ PER YOUR REQUEST
☐ NOTED AND RETURNED

COMMENTS: I see the account [illegible] all these [illegible] under [illegible] Stall for [illegible] Leg & Can Wall [illegible] Hilet Hdqs Feb. 1950

STORE REV. DEPT. (PRINTED IN U.S.A.)

Q-12-1451

INTRA-COMPANY ROUTING SLIP

TO
(DEPT. NO., DIST. OFFICE OR PLANT)

ATTN.

FROM

DATE

☐ NOTE AND FILE
☐ NOTE AND RETURN
☐ NOTE AND SEE ME
☐ INVESTIGATE AND REPORT
☐ TAKE APPROPRIATE ACTION
☐ PLEASE ANSWER
☐ FOR YOUR APPROVAL
☐ FOR YOUR INFORMATION
☐ PER YOUR REQUEST
☐ NOTED AND RETURNED

COMMENTS: [illegible]

STORE REV. DEPT. (PRINTED IN U.S.A.)

Q-13-1452

50A

GX-121

FACSIMILE of Handwritten Portion of p. 2 of GX 121

To: G. V. Lane

From: JRA

Date: 12/3

I see the serious potential of all this, but why must we stand still for Pabco Tkg? Can Watt explore and let them know the implication of their action. From a sales standpoint we cannot ignore 500-750 MSF of business.

GX-121

Los Angeles #147-21 - G. V. Lane
Los Angeles #121-4 - C. O. Futterer

File 12/15/60 Stephens

San Leandro #147 - C. M. Trumbling

November 27, 1960

Los Angeles #147-21 - W. G. Crowley

TRUCKING GYPSUM WALLBOARD - KING LUMBER COMPANY

I am again returning Fresno P. A. #20 which recommends that we truck Gypsum Wallboard at an up price to the King Lumber Company to meet the competition of Pabco.

I investigated this with Ken Chapman in Bakersfield on November 9 and do not question that Pabco does make shipment to the King yards at Shafter, Buttonwillow, Wasco, Corcoran and Arvin. Although all of these yards are serviced by a railroad they do not have a private siding. Kings yards at Bakersfield, Mc Farland, and Taft are regularly serviced by railroad as they have a private siding, and in the case of Mc Farland and Bakersfield serve also as distribution points for the other yards. Their yard at Delano although located right along side the railroad team track is normally supplied from their Mc Farland yard.

It is my feeling that if we were to meet this type competition by Pabco, even at the upcharge it would materially improve the chance of trucking on a wide scale developing throughout much of California. If this happened I question how much longer the up charges would then remain in effect.

In my conversation with Art Masters, President of King Lumber Company, he indicated that if we did meet the competition of Pabco on trucking we could then expect a maximum of 50% of his Gypsum Wallboard business. In my opinion, this would approach 500 M to 750 M per year.

WGC:fw

Bcc:

We should let Art Masters know of our decision. He discussed this at Dallas with Bud Futterer.

GX-121

cc: Los Angeles 9114-7 - J. R. [illegible]
Los Angeles 9147-21 - G. V. Lane

San Leandro 9114 - G. R. Frankling — November 27, 1964

Los Angeles 9147-21 - W. C. Crowley

TRUCKING GYPSUM WALLBOARD - SACRAMENTO P.A. 9126

During the week of November 9th I spent some time investigating the trucking of Gypsum Wallboard by Pabco to the accounts listed on Sacramento P. A. 9126. These were as follows:

Ward Lumber Company - Orland, California
Bone Lumber Company - Yuba City, California
Downey Lumber Company - Redding, California
McMillan Lumber Company - Anderson, California
Diamond National - Grass Valley, California
Yuba River Lumber Company - Grass Valley, California
Hills Flat Lumber Company - Grass Valley, California
Don's Building Supply - Placerville, California

I personally called on all of the accounts with the exception of Don's Building Supply, Placerville, California. My comments regarding each are as follows:

1. Ward Lumber Company, Orland, California - This account has purchased some material from Pabco via truck but is presently buying from Bestwall in 40,000 lb. rail cars and unloading in Orland and hauling approximately 2-1/2 miles to his yard. He made the statement that the extra cost of Gypsum Wallboard when purchased by truck was prohibitive.

2. Bone Lumber Company, Yuba City, California - This account is located in a town serviced by a railroad but prefers truck shipment even at the up charge for the extra convenience. However, I estimate total purchases on an annual basis would be approximately 80 MSF.

3. Downey Lumber Company, Redding, California - This account is presently picking up SHEETROCK from our distributor in Redding, Lumber Dealer Materials Company.

4. McMillan Lumber Company, Anderson, California - Again, a very small yard owned by a contractor whose annual volume, in my opinion, would not exceed 80 MSF.

5. Diamond National, Yuba River Lumber Company, and Hills Flat Lumber Company, Grass Valley, California - These three accounts are all purchasing from Pabco by truck as the nearest railroad, in each case, is located approximately twenty-five miles away.

502

GX-121

To: G. R. Frankling — 11-27-64
From: W. C. Crowley — Page 2.
Subj: Trucking Gypsum Wallboard - Sacramento P/A 126

In the case of Grass Valley, this trucking on the part of Pabco has existed for a considerable time, 8-10 years. At this time I frankly am a little bit doubtful as to just what we could gain if we met this service.

I am of the opinion, from the above, that we would have little to gain and much to lose by meeting the competition of Pabco as I feel once USG started to truck it would soon become widespread and the premium, once that happened, would soon go by the wayside.

WCC:fv

GX-122

CPBW NEWORLN

GPBW PAOLI
6/1/66

NEW ORLEANS TO P MULLER FM R SIKES PAOLI

WE HAVE RECEIVED REPORT THAT G.P. BRANCH IS DELIVERING 1/2" BOARD TO JOB)PLANTATION HOMES PROJECT) AT $42.00 FROM WAREHOUSE BY 40N TRUCK. MAT- ERIAL PURCHASED THROUGH WARD LBR CO., ALGIERS, LA. THIS REFLECTS $1.00 OVER CURRENT DEALER LIST.

PLEASE CHECK AND WIRE REPLY.

GA OR END

END NOLA

033579

GX-123

GPBW PAOLI

TO MR R SIKES PAOLI SALES FM P MULLER NEW ORLEANS SALES 6-1-66

PLANTATION HOMES IS BEING SHIPPED BY RAILROAD CAR AND NOT BY 40N TRUCK. JOB IS GOING THROUGH CARRUTH BROS. LBR. CO., NEW ORLEANS, LA. AND NOT WARD LBR. CO., ALGIERS, LA., AT $45.00 PER M JOB SITE. THE DEALER CARRUTH IS HANDLING JOB FOR $1.00 PLUS 2% DISCOUNT. A CONTRACT HAULER IS TAKING BOARD FROM CAR TO JOB SITE FOR $4.00 PER M.

Called WH 6/6/66 BS

END OR GA
GPBW PAOLI

Called W. Hill 6/9/66

DPRV PAOLI

TO MR R STAES PAOLI SALES FM MYNELL KENTZ NEW ORLEANS PLANT 6-8-66

MR STAES I HAVE NOT BEEN ABLE TO GET IN TOUCH WITH MR MULLER AS YET, BUT WAS ADVISED TO GET IN TOUCH WITH DISTRIBUTION CENTER IN LAFAYETTE, WHICH I DID AND TALKED TO MR DICK DAVIS, DISTRIBUTION MGR. THERE, AND HE TOLD ME THAT SAM P/S HAS NOT BEEN DELIVERED TO PAR HALL DORMITORY, UNIVERSITY OF S.W. LA., LAFAYETTE, LA AT 9281 , THAT THAT JOB IS SIX MONTHS OFF BUT THAT THEY HAD QUOTED THEM $780.

HOPE THIS IS THE INFORMATION YOU NEED.

END OF DA

DPRV 7010.1

Needs Cast 80.40 Mix 53.50

023571

6/7

Ed

Please checking
a Complex report for
N. Hill on
Dan Pac Steel Corp.
Mfrs of S.S. for
Lafayette, La
Alleged
Sold on 4/8 4/5
delivery per date ?

File 033572

6/7

GX-125

GPBW PAOLI

GPBW SLCUTAH
TO R. SIKES FROM W. S. MOLE WESTERN REGION 6/16/66

RE. YOUR TWX OF 6/15/66 - THIS IS NOT TRUE. WE IS GETTING A COMPETITIVE
MARK UP.

GA OR END

033305

GX-125

GPBW SLCUTAH

GPBW PAOLI
6/15/66

SALT LAKE CITY TO W S MOLE FM R SIKES PAOLI

WE RECEIVED A REPORT THAT BILLINGS BRANCH IS SELLING TRUCKLOADS OF GYPSUM
BOARD TO LINDSEY SASH AND DOOR AT .50 CENTS LESS THAN DEALER CARLOAD
COST.
INVESTIGATE AND WIRE US REPLY TODAY.

GA OR END

GPBW SLCUTAH

033306

250-348 O - 77 - vol. 4 - 30

GX-126

GPBW SLCUTAH

GPBW PAOLI
6/20/66

SALT LAKE CITY TO C L CHILDS FM R SIKES PAOLI

BLUE DIAMOND DOES NOT SHIP VIA TRUCK IN UTAH, ALSO NO PICKUPS AT THEIR PLANT.

I UNDERSTAND THAT J&J MILL & LBR CO. HAD AN ARRANGEMENT WITH LAS VEGAS DEALER TO PICK UP MATERIAL AT THEIR SPUR.

SUGGEST YOU TRY TO WORK OUT SIMILAR ARRANGEMENT WITH A LAS VEGAS DEALER.

WE ARE STILL AWAITING A REPORT ON JOB CORPS PROJECT, CLEARFIELD. WILL ADVISE AS SOON AS POSSIBLE.

033312

GA OR END

END

GX-126

FOR MESSAGE TRANSMITTIONS

DESTINATION SALT LAKE TO CL CHILDS FROM R SIKES DATE 6/20/66

BLUE DIAMOND DOES NOT SHIP VIA TRUCK IN UTAH, ALSO NO PICKUPS AT THEIR PLANT.

I UNDERSTAND THAT J+J MILL & LBR Co HAD AN ARRANGEMENT WITH LAS VEGAS DEALER TO PICK UP MATERIAL AT THEIR SPUR

SUGGEST YOU TRY TO WORK OUT SIMILAR ARRANGEMENT WITH A LAS VEGAS DEALER.

WE ARE STILL AWAITING A REPORT ON JOB CORPS PROJECT, CLEARFIELD. WILL ADVISE AS SOON AS POSSIBLE.

GX-126

BILL CHICHESTER 6/2/66
NO TRUCKI —
NO PICKUPS
This dealer usually has an arrangement with
the Vegas dealer to pick up his steel again!
J & J Mill & Elev
Ft. Georges, Utah

10 T/L S 35¢ Cwt

Not siding -
Blue Diamond will truck or will
allow pickup :
404 sail price
936 - 5/8" Reg 4x8
468 - 3/8" Backer 4x8
312 - 1/2 Reg 4x8
More to follow - 033031

GX-127

CPH: CHICAGO

TO: W. R. SIKES FROM J. H. GOETZE 6/24/66 10:30 AM

RE: VILLE BUILDING MATERIALS CORP. MT. PROSPECT, ILL.

WE ARE DEFINITELY NOT TRUCKING INTO CHICAGO. WE DO NOT ENCOURAGE IT OR ADVOCATE IT. WE DID SHIP TRUCK TO VILLE BECAUSE IT WAS NECESSARY TO SECURE TWO PIECES OF WOOMERE WALNUT AT SHORT NOTICE FOR PRESENTATION AT REGIONAL MANAGERS MEETING, AND TRUCKING WAS THE ONLY WAY TO ACCOMPLISH THIS TASK.

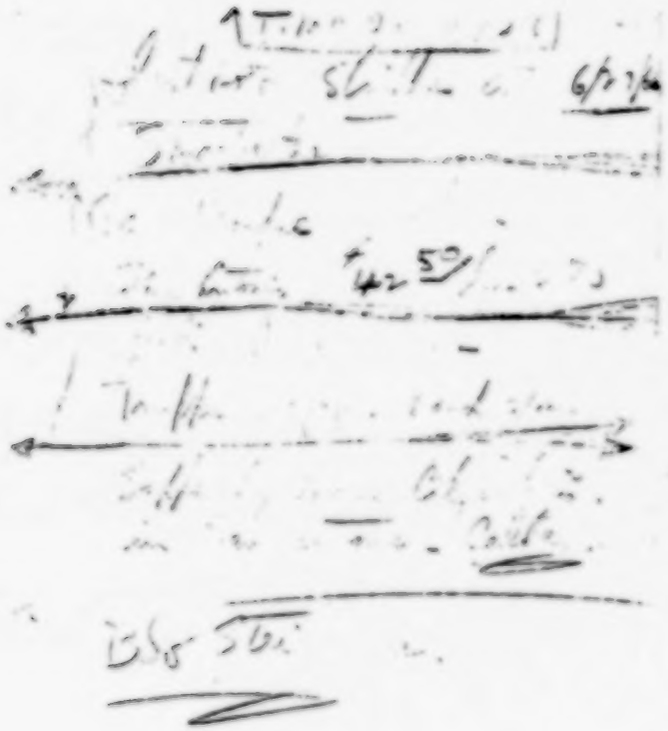
I AM NOT IN OFFICE AT MOMENT, HOWEVER, WE DO HAVE DOCUMENTATION ON SPECIFIC TRUCKLOADS THAT NATIONAL GYPSUM HAS SHIPPED INTO THE MARKET ON EMERGENCY BASIS IN THE PAST. I DO NOT BELIEVE THERE IS ANY REASON FOR ALARM OR CONCERN.
ALSO HAVE DOCUMENTATION ON U.S.G. UNDER SPECIAL CIRCUMSTANCES. ON ANY TRUCKLOAD ORDERS SALESMEN HAVE NEVER BECOME INVOLVED, AND CERTAINLY ARE NOT ADVISING CUSTOMERS THAT TRUCKLOADS CAN BE HAD.

END
CPH: CHICAGO
6

GK Talked to EK 6/27/66

033009

GX-128

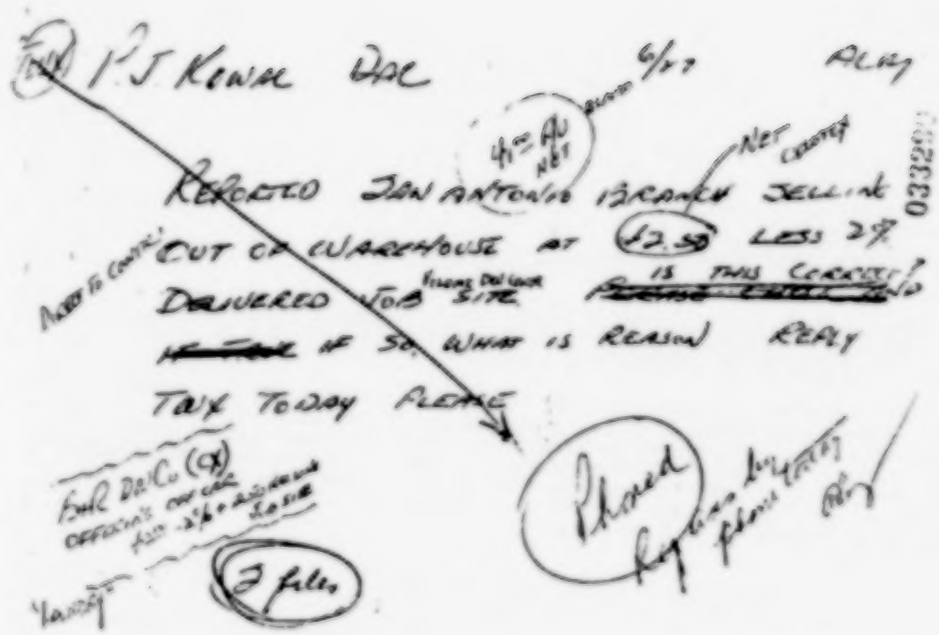


033291

BEST COPY AVAILABLE

[redacted]

GX-128



033291

[redacted]
GX-130

GPBW PAOLI

GPBW DETROIT
7-26-66 10:55
TO R SIKES FM J.D. TORMEY
TWX OUT OF ORDER YESTERDAY AFTERNOON AND THIS MORNING REASON FOR DELAY IN REPLYING TO YOUR TWX

WANDA MAILED YOU INFORMATION JULY 26TH SUBJECT HARWAY PAINTING & DECORATING, CINCINNATI, OHIO RE: RECONSIGNMENT OF CARS. IT CASE WAS NOT CLEARED YOUR DESK QUOTING PARAGRAPH:

"CELOTEX CORP SHIPPED CAR #481104 TO HARWAY PAINTING & DECORATING CO. IN JUNE 1966 AND THIS CAR WAS RECONSIGNED AT TOLEDO TO BE DIVERTED FROM COLLEGE CORNERS TO THE GLENDALE TEAM TRACK AT CINCINNATI, OHIO. THE CELOTEX CORP ALSO SHIPPED CARS NYC 481400 AND NYC 482012 TO SOUTHEAST STAR DRYWALL CO., CINCINNATI, OHIO AND THESE CARS WERE RECONSIGNED AT TOLEDO TO BE DIVERTED FROM COLLEGE CORNERS TO CINCINNATI, OHIO. THE CARS WERE SHIPPED IN JUNE OF 1966."

PHIL JOHNSON AND BILL RUST REPORT THAT CINCINNATI CUSTOMERS ARE DIVERTING CARS FROM COLLEGE CORNERS INTO CINCINNATI

END WA
0

The will check & advise D 7/28/66

032556

[redacted]
GX-130

GPBW DETROIT

GPBW PAOLI
7/27/66

DETROIT TO J D TORMEY FM R SIKES PAOLI

WITH REFERENCE TO YOUR WEEKLY REPORT DATED 7/22/66 PLEASE GIVE US CAR NUMBERS, CUSTOMERS AND DATES ON ALLEDGED CELOTEX COMPETITION CARS DIVERTED FROM COLLEGE CORNERS, INDIANA TO CINCINNATI.

GA OR END

GPBW DETROIT

032557

GX-130

Ed: How you had any recent conversation with Don M. on this? Where do we stand today? Don Miller create our new customer names and customer numbers. 7/25

032559

GX-130

GPB: DETROIT
7/23/46 3:45 P.M.
TO: K A MCCASKILL
FROM: W. KOSCIELNIAK FOR J. D TORMEY - DETROIT

REGIONAL MANAGER'S WEEKLY REPORT - WEEK ENDING 7/23/46

1. MARKET ACTIVITY. THE BUSINESS IN JULY HAS NOT BEEN UP TO EXPECTATIONS; HOWEVER, THIS PASTWEEK WE SHIPPED 2330 M SQ FT INTO OUR REGION WHICH IS QUITE AN IMPROVEMENT ON THEFIRST TWOWEEKS. THERE HAS BEEN ON IMPROVEMENT INTHE LABOR SITUATION.

2. COMPETITIVE ACTIVITY. WE NOW HAVE THREE CAR NUMBERS TO SUBSTANTIAT CELOTEX CORP. SHIPPING CASSIO COLLEGE CORNERS, INDIANA. ANOTHER RECONSIGNING ATTOLEDO TO BE DIVERTED TO CINCINNATI, OHIO.

3. WEATHER CONDITIONS WERE GOOD.

4. PLANT SERVICE TO CUSTOMERS. GRAND RAPIDSPLANT HAD ANOTHER BREAKDOWN DURING THE NIGHT OF THE 19TH WHICH EFFECTED SOME PLASTER SHIPMENTS IN THT SPECS HAD TO BE CHANGED. WE ARE RECEIVING REPORTS BETTERSTORTHALBREECHINLSPRING BRATTEANDGING BAGS (ONE CUSTOMER RE-

5. A LITTLE MORE PROGRESS HAS BEENMADE WITH THE G-P BRANCHES. THERETHAS BEEN CONSIDERABLE CONTACT WITH THE G.D. PERSONNEL IN AL AREAS.

6. NO UNUSUAL REPORTS TO MAKE ON LINE YARD PURCHASES.

AS YOU ARE AWARE, MR. TORMEY WASIN PADLI TUESDAY ANDWEDNESDAY AND TODAY IS IN CLEVELAND. AT MR. TORMEY'S REQUEST THE ABOVE REPORT WASPREPARED.

032560

[redacted]
GI-139

GPBW PAOLI

GPBW CHICAGO
TO: MR. E. FATZ - PAOLI - FM: J. W. PORTER - CHICAGO
2/27/67
YOUR INFORMATION REGARDING ROCK ISLAND IS CORRECT. WE HAVE SHIPPED A TOTAL OF 5 TRUCKLOADS SINCE THE FIRST OF THE YEAR; HOWEVER, IT WOULD BE WELL TO NOTE THAT WE HAVE ALSO SHIPPED 6 - 90,000# FLATCARS TO THE SAME ACCOUNT. I CAN ASSURE YOU THAT THE TRUCKLOADS WERE STRICTLY EMERGENCY AND WE HAVE NOT ANY INTENTION OF VIOLATING OUR ESTABLISHED MERCHANDISING POLICY.
END OF MESSAGE.
GA OR END

GPBW CHICAGO
GPBW CHICAGO
•

Called BW 2/27/67 02920.

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[redacted]
GI-139

1-13	1300108	Lath + F.S.
1-16	1300123	Board
1-25	1300213	SDB + Lbs.
2-7	1300310	Lbs + ST. Dbs
2-15	1300408	Board

S-7423

[redacted]
GE-150

Ref to Contracts –

@PBV PAOLI

@PBV SLCUTAH
TO A. L. MEYER AND R. SIKES FROM V. S. HOLE WESTERN REGION 5/2/66

PABCO IS TRUCKING TO CALIFORNIA MARKET AGAIN.

DIAMOND NATIONAL AT LAKEPORT, CALIFORNIA SHOWED OUR SALESMAN, V. HODGE, INVOICE SHOWING TRUCK LOAD DELIVERED AT FOLLOWING UP CHARGES OVER CURRENT LIST PRICE.

1/4" 1.75 PER M'
3/8" 2.65 PER M'
1/2" 3.50 PER M'
5/8" 4.40 PER M'

GA OR ENO

Ogden White Confirms shipper (40,000 lbs) to Mesa & Pt Reyes Complete) & following destination

Oregon City — Middletown
Cuyama — Kenwood
Ano — Clear Lake
Greenville
Lake Port — 033337

[redacted]
Gx-150

S 1106

Robert
Write note -
to Pabco Lawsuit
on Trans

[redacted]
61-151

May 6, 1966

Western Region

[redacted]

Mr. W. S. Hale

R. Sikes

PABCO COMPETITION STATE OF CALIFORNIA

With reference to your TWX to Mr. A. L. Meyer dated May 2nd, we have been able to confirm your report that Pabco is trucking gypsum board products to the following destinations in the State of California in order to meet the competition of our Distribution Centers:

[redacted]

CRESCENT CITY	LAKEPORT
EUREKA	MIDDLETOWN
FULTO	WILLITS
GARBERVILLE	YREKA LAKE

The Pabco invoices show the following mileage on truckload delivery to the above listed points:

1/4"	.....	$1.75 per MSF
3/8"	.....	2.65 per MSF
1/2"	.....	3.50 per MSF
5/8"	.....	4.40 per MSF

R. S.

RS/def

cc: Mr. K. A. McCardell - Paoli
Mr. A. L. Meyer - Paoli

DOCUMENT NO. S 6241
W.E.C. - 6/1/78

[redacted]
61-152

Gold Bond NATIONAL GYPSUM COMPANY Gold Bond
INTEROFFICE CORRESPONDENCE

To: K. H. Atwell, Manager, Sales Administration — Subject: Pabco Gypsum — Date: May 4, 1964 — From: Western Region Manager

Ken-

Pabco Gypsum have reinstated truck delivery into the Grass Valley section of California - not service by railroad.

They are meeting the competition of Bestwall who have, for all practical purposes for the last several months, secured 100% of the sales.

Pabco is charging the following up-charge for truck delivery:

5/8" wallboard		4.40 per M
1/2"	"	3.50 " "
3/8"	"	2.65 " "
1/4"	"	1.75 " "
1/2"	lath	.0315 per yd
3/8"	"	.0236 " "

I would appreciate any comments you may have on this.

C. Gustafson

CG:rl

NG[redacted] 392881

250-348 O - 77 - vol. 4 - 31

2358m
GX-152

C. Gutzwas
Mgr., Rlr Rls Dept

Pabco Gypsum

May 18, 1966
Sales Administration

Gus:

Thanks for your letter of May 4 in which you pointed out Pabco Gypsum Company's truck delivery program with mileage for this service.

Information I have is that Bestwall would not and has not participated in this type of program on a direct basis but it is identical to the program Georgia Pacific uses out of their warehouse.

I understand no truck deliveries are made directly from Bestwall's manufacturing plant. It has been reported to me that Georgia Pacific is offering this service only into the following cities or towns in California.

Crescent City	Kelseyville
Eureka	Clear Lake
Philo	Cotterville
Lakeport	Middletown

E. E. Atwell

Glen City

NG] 392982

GX 153

11/2/66

Alm:

Have a good look at rate differentials by C Flynn.

He has the carriers. She can load as all that one of them (Bay) in 40,000# minimum.

Please discuss this with the Boys in market place + determine if we should trial + where also try + develop some semblance of what to expect in volume so that equipment can be made available —

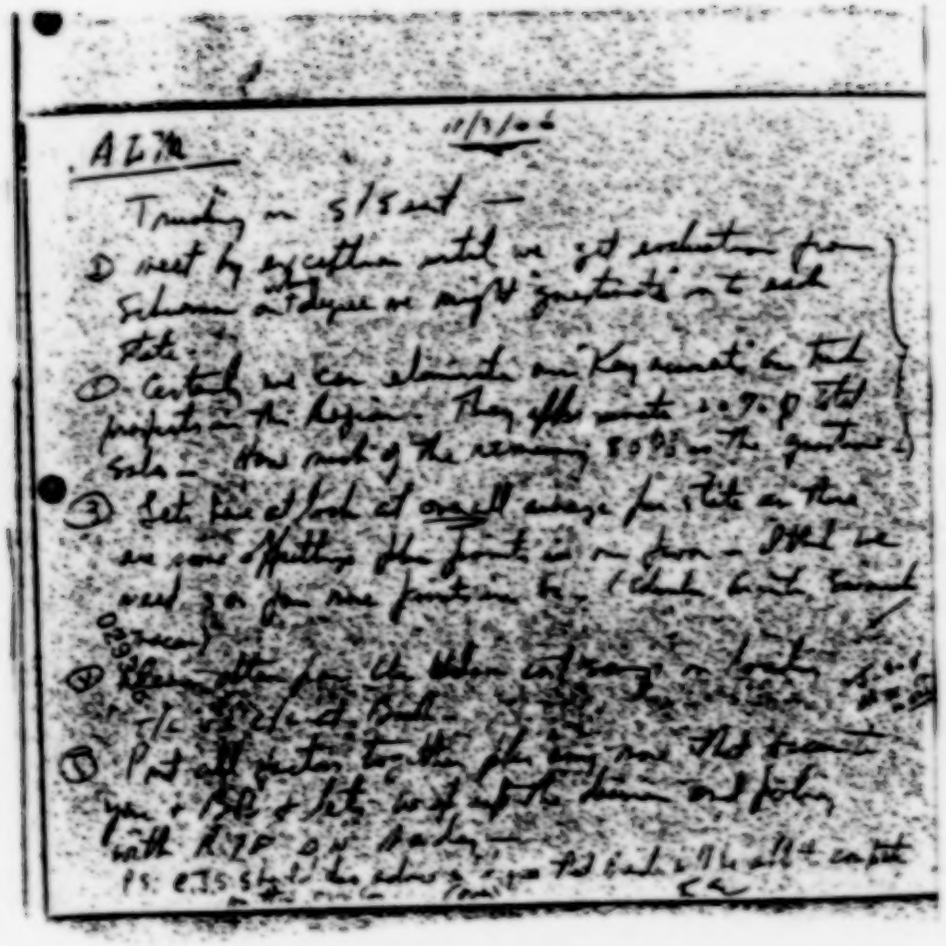
Ken

PS: Chuck is out of town for bal of week.

029-99

Governmental Division

ex 134



ALM 11/3/06

Tuesday in s/s conf —

① meet by exception until we get evaluation from Schwarz & Degen re myself + partners + to ask State —

② Central we can schedule an Xmas reunion for Jerusalem in the Negev. They offer mtn. 10-9 Old Gate — then rest of the evening 50% on the gentiles

③ Let him look at overall charges for State in Tel Aviv Hotels the Jerusalem — Old Gate and Jaffa Gate

④ Shemesh for the Allen Wrong Number

⑤ Put all factors together the Hebrew Old Testament + Old + New Testament and Holy with KJV or Nelson — [illegible]

I'll + Plato should be treated separately —

GI-155

Cost & Load per Mi. of ft 1 Mile lbs		Rail	Comm.
1.79	[illegible]	.½	*.35
2.92	[illegible]	.½	*.60
2.92	[illegible]	32½	.47
.66	[illegible]	.½	.28
3.30	[illegible]	23½	.71
2.36	[illegible]	11½	.54
2.92	[illegible]	34½	.49
2.73	[illegible]	30½	.51
1.60	[illegible]	34½	*.43
1.60	[illegible]	30½	.39
1.98	[illegible]	32½	.43
1.79	[illegible]	26½	36

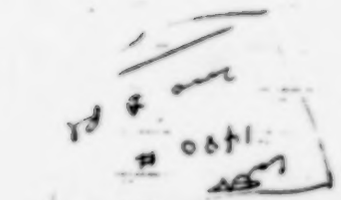
*4CM1

Homestead, Fla	81	49½	*66	32
St Augustine, Fla	54	36½	*52	
Coral Gables, Fla	150	44½	*60	
Florida City, Fla	104	48½	*60	
Naples, Fla	42	41½	*58	
Augusta, Fla	20	34½	*49	
Hollywood, Fla	21	41½	*58	
Mobile, Ala	60	48½	58	32
Dothan, Ala	20	31½	42	51
Montgomery, Ala	84	34½	48	40
Birmingham Ala	208	41½	54	41
Huntsville Ala	81	49½	59	58
Fayetteville, Ala	21	44½	57	45
Gadsden, Ala	81	39½	53	54
Florence, Ala	64	53½	71	57

02939a

DOCUMENT NO. S 7424
W.E.C. – 8/1/72

GI-155



Add
National announced internally that they are meeting Kaiser in Southeast & Gulf Southern Fla Area. KA 11/4/66

DOCUMENT NO. S 7475
W.E.C. – 8/1/72

[redacted]
GX-156

#145-2 B.N. re claim #79115
TO: #145-4 B/S file
FROM: J.P. Galvin, Department #970-P

B.N has given their Blue Rapids plant and K.C. Regional Sales Manager authority for emergency truck shipment of rail orders at the rail price. This due to rail car shortage and applies to accounts in Kansas (all), Nebraska (all) and Western Missouri (including K.C., Mo). Possible 1/2 basis of this report.

232045 — JPG

[redacted]
GX-156

ROUTING SLIP

Date 4/8 1966

TO:

- CHICAGO #970 - MR. E. W. DUFFY
- CHICAGO #970-S - MR. E. PAPPERT
- CHICAGO #970-A - MR. W. R. HOGAN
- ✓ CHICAGO #970-P - MR. J. P. GALVIN
- CHICAGO #971 - MR. R. D. FISHER

FROM: KANSAS CITY - MRD WHITEHTON #108
Div. Mgr. Cr. Pl. Area

We are getting to heavy regional Buttonwood. Does not to be something in the cereal

USG/2 232046

61-156

CHECK AS APPLICABLE
☐ COMPETITIVE PRICE & POLICY REPORT ☐ REQUEST FOR SPECIFIC PRICE ADJUSTMENT

A

Schmaltz Oil Co.
Hays (Ellis) Kans

Same

USO COMMODITIES

Jet Fuel Type JP

B

C

Schmaltz Oil Co. Hays Kans
Russell
Ellis County Court House in Hays, Kans. Same on
Hwy 183 with - on a T/L's phone at POL on
site - Hours unlocked at all times.

For information only USO/2

232047

61-156

CHECK AS APPLICABLE
☐ COMPETITIVE PRICE & POLICY REPORT ☐ REQUEST FOR SPECIFIC PRICE ADJUSTMENT

GOVERNMENT EXHIBIT 152

A

USO COMMODITIES

B

C

10

USO/2

232203

BEST COPY AVAILABLE

[redacted]
GX-158

	#170	E.W. Duffy
	#170-S	E. Peppert
	#170	R.B. Fisher
	#170-A	W.R. Hogan
	#170-M	J.V. Bledsoe
	#170-M	K.R. Eckrote
	#170-P	R.B. Spitsig
	#170-P	J.F. Moore
	#108	H. Whitenton
	#101	R.G. Sanders
	#139	J.A. Jensen
	#110	V.M. McLaughlin
	#102	T.M. Dilworth
	#100	R.V. Zellers
	#145-1	O.R. Evans
X	#145-2	P.V. Weiser (2)
	#145-3	P.V. Spilliotis

Note & Return	X
Note & Forward	
Let's Discuss	
For Your Approval	
For Your Information	

Comments:

c/17 (3)

This is two counties north of authorized trade area in Nebraska. Suggest you look into this Account No. 65

FROM: J. P. Galvin #170-P

USG/2 [redacted]

[redacted]
GX-158

Sikes

61-160

GEORGIA-PACIFIC

INTERDEPARTMENTAL COMMUNICATION

DATE May 25, 1966

TO Mr. R. Sikes

LOCATION Pacific General Sales

FROM L. V. Hiles

LOCATION Cleveland Office

SUBJECT BUILDERS SUPPLY & LUMBER COMPANY
Jersey, New York

RE: Flintkote Business and Jim Murray

I am attaching to this memo a copy of a memo I received from Bob McDonnell, our Buffalo territory salesman, dated May 19th on the subject. I thought the information contained in this memo might be quite interesting to you.

Needless to say, I hate to see this business start on leaving trailers at the dealer's yard, such as Mr. McDonnell is describing in his memo. I realize that the rest of Mr. McDonnell's memo is quite vague. However, here seems to be one of the typical cases where we cannot get down into the exact competitive condition involved.

I would appreciate any comments you might have on the attached memo.

LVH:ja

Attach.

RECEIVED
GENERAL SALES - GYPSUM

MAY 27 1966

NEWAYGO GYPSUM COMPANY

Borsych
Wilson 28 - T/L - 20
Lindenhurst - Bridgeport Attleboro
Bellport N.Y.

9:2371

61-160

GEORGIA-PACIFIC

INTERDEPARTMENTAL COMMUNICATION

DATE May 19, 1966

TO Mr. L.V. Hiles

LOCATION Cleveland Sales

FROM R.C. McDonnell

LOCATION

SUBJECT BUILDERS SUPPLY & LUMBER CO.

RE: Flintkote Business & Jim Murray

Several weeks ago Don Felber indicated that there was the chance that Flintkote made a deal with Jim Murray. This occurred at the time that their salesman Bill Maier left them. I told you the other day that there was 4 truckloads from Flintkote last week and there is at least 2 this week. This bothered me. So today I happened to be at Builders Supply at 4:30 when I knew Jim Murray would stop after work. He does practically every day.

I asked Jim why he would continue to do business with Flintkote now that Bill Maier left. I then pointed out that I had just received a compliment from another tough drywall contractor telling me that we had the best board on the market. So laughingly told me that they could make the worst board, or even have their trucks late and have everybody mad BUT when that truck arrives everybody would be smiling again. Don Felber agreed with him. I asked him if he could let me know whats going on. He laughed and said some day I would know. I shouldn't complain because Bestwall had more business now than they ever had in this market. I just couldn't get any more information out of him or Don. A young bookkeeper in Felbers office, who usually doesn't say anything (its none of his business) made a remark 'your with the wrong company'. Jim Murray also stated that he doesn't care if they ever get another salesman, they don't need one.(meaning Flintkote).

AT3290

So now in addition to Flintkote leaving trailers at Builders Supply's yard, there is something else going on. In view of this, I believe that we should watch the business from Felber's very close. We will get some business from them because of Ryan Homes, but if this is all, WTTBI I then believe that we should take another look at this joint cement deal we have with them. They are not doing much with it anyway, but because it is such a good deal they may be afraid to loose it. By using a very diplomatic approach (threat), they may tell us whats going on. Or else we may have to make a deal similar to the one at Joe Dougherty's. The only fly in the ointment on this point is, that Flintkote may give them just as good a deal on OUR own cement. I certainly will not bring any more jobs into them until this thing is resolved. The jobs I have brought them last year are forgotten. Its possible that you may be able to get information that they will not reveal to me.

I will discuss further with you by phone.

R.C. McDonnell

8020

DOCUMENT NO. 8
W.S.G. - 6/1/73

[redacted]
GX-161

June 20, 1966

Mr. R. W. Mills

Cleveland Sales Region

R. Sikes

Paoli

BUILDERS SUPPLY & LUMBER COMPANY
Depew, New York

With reference to your memo under above subject dated May 25, I have checked out the competitive situation relative to Flintkote dropping off trailers in subject account's yard, and the information I received indicates that they definitely will not permit trailers to be dropped in the dealers yard. They do have piggy-back shipments of insulation board moving to this account. If trailers of gypsum board are being left in subject accounts' yard, this is definitely a deviation from Flintkote's published policy, and I feel quite certain that the competitive situation no longer exists of this date.

I suggest that you follow this matter closely and let me know if I am incorrect in my assumption.

R. S.

RS/def

113295

1005
DOCUMENT NO. 5 _____
W. E. C. – 6/1/78

[redacted]
GX-162

GEORGIA-PACIFIC

INTERDEPARTMENTAL COMMUNICATION

DATE July 7, 1966

TO Mr. R. Sikes ← THIS COPY FOR

LOCATION: Paoli General Sales

FROM R. W. Mills

LOCATION: Cleveland Sales

SUBJECT: BUILDERS SUPPLY & LUMBER COMPANY
Depew, New York

I am attaching to this memo a short memo I received from Mr. Robert McDonnell, our Sales Representative in Buffalo, New York.

As you may remember, a short time ago, I reported a competitive situation involving the Flintkote Corporation with the subject Bestwall account. On various occasions, Mr. McDonnell as well as myself have seen trailers delivered carrying Flintkote gypsum board, dropping it in the subject yard, and leaving it there until the trailers were unloaded. They are picked up empty on a future date. I understood from you that Flintkote denied this type of service.

As you can see from Mr. McDonnell's remarks, it appears that Flintkote is continuing this practice. I realize that a picture of these trailers would be most desirable at this point. However, the subject continues to buy some Bestwall material and we certainly don't want to antagonize him by taking pictures. I am sure you will agree, however, that this is a very poor practice, and I hope that there is some way that it can be discontinued.

I thought you might also be interested in the newspaper article that McDonnell has clipped onto his memo.

Any information you can give me on this subject would be appreciated.

R. W.

RWM:lrb

CC: Mr. A. L. Meyer - Paoli

BS would advise 7/11/66 VO.

RECEIVED
GENERAL SALES - GYPSUM
JUL 11 1966
BESTWALL GYPSUM COMPANY

1009
DOCUMENT NO. 5 _____
W. E. C. – 6/1/78

GPO 0 - 77 - VOL. 4 - 52

GX-162

OFFICE MEMO

To Cleveland Date 7-2-46 From

Attention of Bill Meter Subject

Answering memo

The attached newspaper article is the one that was in yesterdays (7/1/46) evening paper.

You might also like to know that Builders Supply received Four Trailers from Flintkote this week. They were all left at the Yard full and the empty ones taken back. Why didn't they have to abide by the "Gentlemens Agreement" ??? R. McD.

CYPSUM WORKERS WALK OFF JOB

Nearly 350 production and maintenance employes left their jobs today at the National Gypsum Co.'s Clarkson Cement plant after negotiators failed to produce a new contract. They are represented by Local 8347, Oil, Chemical & Atomic Workers Union (AFL-CIO).

Federal Mediator Thomas R. Colvin is calling a conference of bargainers for Friday in the Federal Mediation & Conciliation Service's Buffalo office.

GX-169

GRAV CHICAGO
5/24 3:48 PM
TO MR. A. L. MEYER - PADLI FROM MR. J. H. GOETZE CHICAGO SALES

CC: W. B. BROOKS Bob Stidwell -

RE: ROCK RIVER GYPSUM SUPPLY Will Advise
ROCKFORD, ILLINOIS 5/24/66

MR. BROOKS HAS DEVELOPED PRELIMINARY INFORMATION THAT EITHER GRAND RAPIDS OR FLINTKOTE COMPANY HAVE OFFERED TO SHIP THE SUBJECT BOARD FROM CONSIGNED TO BELOIT, WISCONSIN, LEAVING THE BILL OF LADING CLEAR REGARDING THE 40-DIVERSION CLAUSE. THE SUBJECT HAS NEGOTIATED WITH THE MILWAUKEE RAILROAD WHO HAS AGREED TO PERMIT DIVERSION TO ROCKFORD, ILLINOIS AT A COST OF $10.00 PER CAR. ESSENTIALLY, THIS WOULD TRANSFER THE SHIPMENTS FROM A $46.00 ZONE TO A $44.00 ZONE WITH OBVIOUS ADVANTAGES.

WE BELIEVE THIS TO BE FACTUAL INFORMATION, HOWEVER, AT THIS POINT ARE UNABLE TO OFFICIALLY CONFIRM WHETHER OR NOT BOTH COMPANIES QUOTED HAVE MADE THIS OFFER. THIS IS AN OBVIOUS COMPETITIVE SITUATION WITH OUR CUSTOMER, WHOM WE ARE SUPPLYING WITH 60% OF HIS REQUIREMENTS. PLEASE INVESTIGATE AND ADVISE.
END CHICAGO

030037

[redacted]
GX-170

GPBV CHICAGO

GPBV PAOLI
6/1/66

CHICAGO TO J GOETZE FM R SIKES PAOLI

REPORT YOU RECEIVED WITH REFERENCE TO FLINTROTE OR GRAND RAPIDS ALLOWING CARS TO BE DIVERTED FROM BELOIT TO ROCKFORD IS ERRONEOUS.

THIS IS NOT BEING DONE OR OFFERED BY COMPETITO[redacted].

GA OK END

033035

GPBV CHICAGO

250-340 3286

[redacted]
GX-171

2377
Jan spun file Obn

023854

Obn

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GX-171

EFF
For your files
ALM

CARROLLTON - LARRY TRAMMEL FROM A.L. MEYER 2/29/68

APPROVE JOB SITE DELIVERY 40M TRUCKLOADS INTO DALLAS COUNTY ONLY DIRECT FROM PLANT AT TRUCKLOAD PRICES TO MEET COMPETITION. ONE STOP DELIVERY ONLY. NO STOCKING OR OTHER SERVICES AT JOB SITE.

YOUR DISCRETION TO MEET ALLEGED CARLOAD PRICES WHERE NECESSARY SAME TYPE OF DELIVERY. HOWEVER, OUR PRICE TO BRANCH WILL BE ON TRUCKLOAD BASIS.

WE WILL NOTIFY PLANT TO ACCEPT ORDERS AS ABOVE. PLS ADVISE SCOTTY.

ALM

(Retyped for legibility)

[redacted]
62-171

MATERIAL	% Rl.			% Rl.		
1. Base Mill Price						
2. Freight From Base Mill						
3. Regular Delivered Price	46.25			45.75		
4. Adjustment or Price 14.2	6.61		18.3	8.37		
5. Recommended Delivered Price	39.64			37.38		
6. Freight From Our Mill 40	8.10		23½	8.57		
7. Warehousing						
8. Trucking				1.87		
9. Cash Discount @ 5%	1.98			7.44		
10. TOTAL	10.08			29.94		
11. Net at Our Mill	29.56			18.14		
12. Standard Cost	18.14			11.80		
13. Gross Profit	11.42			25.8%		
14. Percent Gross Profit (Line 13 Divided by Line 11)	24.7%					
Our Selling Mill Atlas						

SALES OFFICE So. Houston DATE 2-25-68
ACCOUNT Bruce's
ADDRESS Dallas, Texas

[redacted]
62-171

National Mgr.
Jet-aire sld
T/L Dallas

arnold.

(Acetylator report to our
214 CH2-J261
Passenger)

TL

023536

[redacted]
GX-171

P
GPSV PORT

GP REG CLTON
MR. K. A. MCCASKILL FROM LARRY TRAMMEL - 2/28/68

I UNDERSTAND NATIONAL IS QUOTING CARLOAD PRICES ON MILL TRUCKS DELIVERED JOB SITE IN DALLAS COUNTY. CAN WE DISCUSS THIS WHEN YOU RETURN TO THE OFFICE ON FRIDAY.
GA GP END

TU ENDH

[redacted]
GX-175

E. L. McDonald : 1/17
K. Sides

Please give me a current listing of the markets where J. M. is deviating from Industry Merch. Policies —
As far as possible list accounts, Names of Salesmen & other particulars —
I will be going to NY soon to handle —
Destroy this —
K Cass

P.S. I will add details on the Atlanta situation.

028068

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GX-176

COMPETITIVE ACTIVITIES - J-M SALES CORP.

1. Direct Sales to Applicators by Johns-Manville -

   Gene Drywall, Albany, New York

   Maurice St. Jacques, Albany, New York

   Wilford Daigle, Cohoes, New York

   M & S Drywall, Long Island, New York

   Jack Italiano, Long Island, New York

   Keystone Drywall, Willoughby, Ohio

   Humphrey Supply, Hammond, Indiana

   Superior Taping Co., Cleveland, Ohio (Mr. John Deacon - Job Deliveries)

   Marks Painting & Decorating Co., Cleveland, Ohio

   Job site delivery - Galbreath Job, Cleveland, Ohio (for C. A. Lafon - no longer contractor)

2. Johns-Manville offered Whitehall Builders, Columbus, Ohio $1.00 per M Sq. Ft. plus additional $$.

3. On December 3rd, J-M delivered five trucks of board to the Job, Mentor Mall Shopping Center, Euclid Avenue, Mentor, Ohio.

4. Industrial Wholesale of 1301 Lloyd Road, Cleveland, Ohio, was the consignee - Vonham was the delivery carrier. The drivers were:

   Charles Weid
   Ohio plates - 10 DT 86

   Gary Holdoff
   Michigan plates - 4515 CD

5. For sometime it has been an industry practice that Government bids were made by distributors from the West Coast. Manufacturers or gypsum producers did not bid these on a direct basis. J-M bids on a direct basis.

6. St. Louis: J-M is setting up Koch & Sloe (Drywall Contractor) as a dealer outlet. Lockland Station - Rock Island Rail Siding.

028071

GX-176

J. M. Jones - Mid Central Sales

MID-CENTRAL SALES — JANUARY 9, 1964 — MID-CENTRAL SALES M/S

Mr. T. L. [illegible]

JOHNS-MANVILLE SALES CORPORATION

R. W. MILES - mwp

cc: Mr. E. A. McCaskill - Ardmore
Mr. R. Sikes - Ardmore

THIS COPY FOR [illegible]

Subject: Johns-Manville Job Deliveries - Cleveland Area

I am quoting below a memo I have received from our Cleveland sales representative, Mr. L. H. Korfonge. I have received numerous reports of J-M making these job deliveries in the Cleveland area. Most of the time, we are unable to get specific information, so that we can follow this with the subject and try to bring this practice to an immediate stop. It may be well to bring this matter to the attention of the Traffic Department, so that they can acquaint the Vonham Transportation Company of the fact that we do not make job deliveries on gypsum products.

"On December 3rd, J-M delivered five trucks of board to the Job, Mentor Mall Shopping Center, Euclid Avenue, Mentor, Ohio.

Industrial Wholesale of 1301 Lloyd Road, was the consignee - Vonham was the delivery carrier. The drivers were:

Charles Weid
Ohio plates - 10 DT 86

Gary Holdoff
Michigan plates - 4515 CD

U.S.G. salesman, Don Mauter, discovered the above two truckloads and took pictures. The information was obtained from Mr. Mauter."

Called Joe Marcum 1/10
Mistake (perhaps) by order clerk
on part of Jim [illegible] whole matter very
firmly straightened out with Lauck
& Coffelt by Joe Marcum.
J.C.

030592

[redacted]
64-209

THE CELOTEX CORPORATION
Use Separate Sheet for Each Subject

CEL 6620

TACOMA REYNOLDS

From

Date 2-8-44

Subject Warren Hill

CELOTEX 323461

No Price Decision in Zellerbach...
Zellerbach...Looked up Green
May 1st -
No shipments since
April 1st -
Dave Beaumont

[redacted]
64-210

112219

V

CEL 6620A

30 J T WILSON OAKLAND FROM W E HILL GYPS TAPA 2/11 9.40-EC

RE TT 99 TO GODDARD DATED 7 8 WILL NOT SELL 5/8" FIBOK AT PRICES BELOW CURRENT CELOTEX PUBLIC DEALER PRICES OF $74.50 PER PHOND CONVERSATION WE WILL TAKE NO FURTHER ACTION ON THIS MATTER UNLESS YOU CAN PROVIDE US WITH ADDITIONAL EVIDENCE THAT A LOWER PRICE EXISTS IN THIS MARKET

CELOTEX 323462

GX-211

VE3VEL4
47 D MILLER TAMPA FROM J T WILSON DAY 3/12-12.35
49 CC-W LEES LA

CEL 6613

RE MY PREVIOUS TELETYPES ON MY TELEPHONE CONVERSATION WITH YOU AND WILL. I HAVE RECHECKED THE COMPETITIVE FACTS AND FIGURES ON ZELLERBACH PAPER CO AND FOX DRYWALL IN TACOMA WASH.

ZELLERBACH HAVE PROTECTED 900,000 FT OF 5/8" FIRESTOP BOARD TO FOX AT A PRICE OF $74.50 PER M. THIS IS BLUE DIAMOND BOARD ONLY TO COVER 4 JOBS SOLD BY FOX PRIOR TO THE PRICE CHANGE. ZELLERBACH HAVE STATED THAT THEY CAN PROTECT THESE JOBS ONLY WITH BLUE DIAMOND MATERIAL AND ONLY TO THE AMOUNT OF THE 900,000 FT.

ZELLERBACK CURRENTLY HAVE IN STOCK LESS THAN 20,000 FEET OF 5/8" BOARD. THEY CAN ONLY INVENTORY APPROXIMATELY 2 CARLOADS OF MATERIAL AT A TIME. ON MAY 1ST THEY HAD NO INVENTORY OF 5/8" BOARD. THEY STATE BLUE DIAMOND HAS PROTECTED THE 900,000 FEET ON ORDERS PLACED PRIOR TO MAY 1ST, BUT SHIPMENT WILL BE ANY TIME UP TO THE END OF THE YEAR UNTIL THE 4 JOBS AND 900,000 FEET HAS BEEN USED.

OUR DEALER TACOMA DRYWALL SUPPLY IS PLACED AT A DISADVANTAGE. THEY CANNOT SELL AT $74.50 WHEN THEIR CARLOAD COST IS $74.50. ONE OF THEIR CONTRACTORS LAKES DRYWALL HAS APPROXIMATELY 1,000,000 FEET OF 5/8" FIRE STOP ON CONTRACT FOR JOBS SOLD PRIOR TO THE MAY 1ST INCREASE.

I REALIZE WE CANNOT OR SHOULD NOT CUT THE PRICE WITHOUT VERIFICATION. HOWEVER, I DO HAVE COPIES OF ZELLERBACK INVOICES TO FOX DRYWALL. IS THERE ANYTHING WE CAN DO TO PROTECT OR PARTIALLY PROTECT TACOMA DRYWALL AND LAKES DRYWALL ON AT LEAST PART OF THEIR MILLION FEET ALL ON SCHOOL JOBS. THESE JOBS CANNOT BE RE-NEGOTIATED. THE NEW PRICE IS PUTTING A FINANCIAL HARDSHIP ON LAKES DRYWALL. IF LAKES CANNOT PAY THEIR BILLS TO TACOMA DRYWALL OUR VERY GOOD 100 PCT CELOTEX DEALER WILL BE PUT INTO A FINANCIAL BIND. TACOMA DRYWALL REPRESENTS APPROXIMATELY $190,000 IN PURCHASES FROM US PER YEAR. TODATE THEY BUY ONLY FROM CELOTEX.

PLEASE REVIEW AGAIN AND LET ME HEAR FROM YOU BY THE END OF THIS WEEK - JULY 19TH.

323454

CELOTEX

GX-212

THE CELOTEX CORPORATION

CEL 6613

To _____ Time _____

Date _____

Subject Tacoma Drywall Co

1. Do on Record Claim of Fox K
2. Note - Not received as yet -
3. To ~~Jot~~ still getting ~~it~~ from Zeller Rich Fox
still getting see me for
if yes.
Note - Blue Diamond - 15c
Yes - Don't be mis[illegible]

4. [illegible]

Can be extended not a matter
30 to 60 days -

Letter
Hunt to Lee Co Jan 10
No. Y

CELOTEX 323460

250-248 O - 77 - vol. 4 - 33

GX-213

91 J NELSON OAK FROM D W MILLER TAMPA 7/14 3.05 EC

RE YOUR TT 47 ZELLERBACK CANNOT APPROVE ANY DEVIATION IN PRICE ON 5/8" TYPE X WALL BARD I DOUBT VERY MUCH THAT ZELLERBACK HAS ANY PRICE PROTECTION ON SUBJECT MATERIAL

CELOTEX 323443 CEL6602

GX-214

July 20, 1966

CEL6596

TACOMA DRYWALL SUPPLY
Lakeview, Washington

W G Lees
Los Angeles

cc: D W Miller Tampa

Last week when we were together we discussed the price problem on 5/8" Firestop Gypsum Wallboard with Tacoma Drywall Supply. As you recall I sent a long teletype to Don Miller in which I spelled out the competitive details. Yesterday Miller answered my teletype by stating we cannot approve and that he doubted that Zellerbach Paper Co had price protection on 5/8" Wallboard from Blue Diamond.

I completely disagree with Don Miller's stand. I especially disagree with his statement that he doubts that Zellerbach has any price protection. If he is right; how could Zellerbach invoice Fox Drywall at the published Dealer carload price of $74.50 for LCL orders. (copies of two June 7th invoices are attached) Also why would Zellerbach sell Fox at this price only on Blue Diamond Board and not U S G or National, the other two brands they carry. I personally know that Zellerbach in Tacoma can only inventory approximately two carloads of material at a time. I know they had no stock of 5/8" Board at the time of the May price increase. All of the material subsequently bought by Fox has been received since May 1st.

For your information Tacoma Drywall Supply is owned by Jerry Cramer and Harvey Jesette. Cramer is the sole owner of Lakes Drywall, a Drywall Contracting firm. Recently Donald Fox of Fox Drywall, a Drywall Contracting firm bought into Tacoma Drywall. On this basis Fox has a definite interest in buying from Tacoma Drywall. I'm sure he is telling the truth when he says he cannot afford to buy 5/8" Board from Tacoma Drywall when Zellerback will sell him at $74.50. We may not want to recognize these facts, but they are still facts.

Because of all this we have been placed in a very awkward position. Our exclusive Dealer, Tacoma Drywall Supply have been furnishing 5/8" Type I Wallboard to Lakes Drywall. Lakes Drywall have approximately a 500,000 feet of 5/8" on contract for six school jobs. Lakes Drywall cannot change their contracts. Therefore, at the present pricing they feel they will suffer a financial loss.

Because of all this we stand to lose a $200,000 per year Gypsum Dealer, Tacoma Drywall Supply. This has been an excellent account for us; at the same time every other manufacturer is eager to sell them. If we lose them because of the Blue Diamond price through Zellerback to Fox Drywall it will be a major loss to our sales volume and one that will be almost impossible to replace.

CELOTEX 323437

[redacted]
GX-214

CEL 6597

Is there anything you can do to help on this. My recommendation is that we make some kind of concession to Tacoma Drywall. Even if we offered them as little as 50¢ per M allowance on only part of the school jobs it would let them know that we recognize the problem and are willing to give them some kind of aid and assistance. As it is now they view our negative attitude as being one of somewhat indifference. That we care little whether they sink or swim.

This has kicked around for over a month now. Whatever we do must be done promptly.

J T Nelson
District Manager

JTN:mdm

CELOTEX 323438

[redacted]
GX-215

CEL 6593

VELVEOV
103 MILLER TAMPA
CC 85 W G LEES LA DIST FROM J T NELSON GA 7/21-1.15

I WROTE YOU ON 7/20 WITH REFERENCE TO YOUR TT IN ANSWER TO MINE OF JULY 12TH ON PRICE OF 5/8" FIROK TO TACOMA DRYWALL SUPPLY ON COMPETITIVE BLUE DIAMOND PRICES.

TACOMA DRYWALL CALLED ME THIS MORNING TO INFORM ME THAT THEY HAD A FIRM PRICE QUOTATION OF $70.75 FOR ONE MILLION FEET OF 5/8" FIRESTOP BOARD TO COVER THE JOBS ON CONTRACT BY LAKES DRYWALL. THE $70.75 PRICE IS THE OLD DEALER LIST IN TACOMA PRIOR TO THE MAY 1ST INCREASE.

THIS PRICE OFFER & QUOTATION IS FROM EITHER U S G OR KAISER. THEY WOULD NOT TELL ME THE NAME OF THE MANUFACTURER BECAUSE THEY SAY TOM DRYWALL WAS EMBARRASSED WHEN BLUE DIAMOND CRITIZED ZELLERBACK FOR EXPOSING THEIR DEAL. I,M SURE THE TACOMA DRYWALL QUOTE OF $70.75 IS EITHER KAISER OR U S G SINCE SHIPMENTS WOULD BE FROM SEATTLE. KAISER HAVE A PLANT AND U S G HAVE A WAREHOUSE IN SEATTLE.

UNLESS WE DO SOMETHING IMMEDIATELY WE WILL LOSE A $200,000 DEALER ACCOUNT. TACOMA DRYWALL CAN,T AFFORD TO PAY US $74.50 WHEN THEY CAN BUY FOR $70.75

I MUST HAVE ANSWER BY FRIDAY AFTERNOON JULY 22ND. I KNOW YOU HAVE BEEN SAYING "NO" BUT I STILL DON,T THINK WE WANT TO LOSE A $200,000.00 ACCOUNT BY REASON OF A COMPETITIVE PRICE CONCESSION. I AM SURE THESE PEOPLE ARE TELLING THE TRUTH. THE PRICE WAS QUOTED BY A MANAGER OF EITHER U S G OR KASIER - - - NOT AN UNAUTHORIZED QUOTE BY A SALESMAN.

WILL YOU CALL ME ON THE BAN LINE TODAY/////////

CELOTEX 323440

GX-216

CEL 6595

VEGV
92 NELSON OAKLAND FROM MILLER TAMPA 7/21-4.35 CP
123 CC LEEB LOS ANGELES

WE WILL NOT DEVIATE IN PRICE TO MEET USG OR KAISER ALLEGED QUOTATION
TO TACOMA DRYWALL SUPPLY CANNOT UNDERSTAND YOUR STATEMENT THAT FOX
DRYWALL WAS EMBARRASSED AND SUGGEST YOU DISCUSS THIS WITH ME SOME
DAY WHEN YOU ARE TALKING TO TAMPA ON PHONE

CELOTEX 323439

GX-217

THE CELOTEX CORPORATION

Use Separate Sheet for Each Subject.

GX 217

CEL 6595

253

To

Date 7/21/58

Subject Tacoma Drywall

Telephone Call from Miller —

No. 1 Cannot meet alleged quotation on 5/8" Panel By Gen. Gypsum Kaiser or USG.

2 Of quotation from American Gyp. Republic — Still cannot quote.

3 From Legal standpoint Attorney must see Contract GO at different prices per Can proof of Complaint Brown Factory price Discount Collection If Tacoma Drywall can buy a car load and give us letter of credit

4 We don't think any dealer dig Can special price. Check Gyp. price Le American - U.S. Republic

5 Fox and Miller Lath — We have not Contract with Blue Diamond Co. Can we Get and what is Miller Lath & Plaster Co. or Fox Lath Co. Check

CELOTEX 323439

Call Jerry Croker - Mon 2:30 PM

GX-218

THE CELOTEX CORPORATION

Use Separate Sheets for Each Subject

GX [redacted]
218

CEL 6594

25¢

From Dick Lee

Date 7/21/66

Subject [redacted]

Tacoma Drywall -

NC Sir Grossmont

Kansas Wonder Nat Gell

Tacoma Drywall

Blue Diamond Bathroom

Hubbell Re Sanding

Jerry Crabb 7/21/66

Lakes Drywall -

Lake Point at $20.25 plus

Blue Diamond Reg $24.00 -

Best Wallz GP - Kick Pail & Pad

at $2.00 per M on ½ Type X

Kaiser - USG offer -

Will Buy if they get no F. Quotes -

CELOTEX 323435

GX-219

THE CELOTEX CORPORATION

Use Separate Sheets for Each Subject

From Seattle

Date 7-25-66

To Mr. A. J. Nelson

Subject 5/8" 1-Hour Price Protection CEL 6592
Tacoma Drywall Supply

Tacoma Drywall Supply has obtained invoices from Lakes Drywall Company showing that Sellerbach Paper Company has been protecting a $79.50 5/8" 1-Hour board price to Fox Drywall of Tacoma for 500,000 feet of board. He is purchasing Blue Diamond gypsum at this price. This is all the more evident since Mr. Don Fox of Fox Drywall is purchasing an interest in Tacoma Drywall Supply, our dealer outlet, but is still purchasing his 5/8" requirements from Sellerbach Paper because of this price protection.

This pricing situation was made known to us by Jerry Crabee of Lakes Drywall as he also needed protection on approximately 1,000,000' of 5/8" to complete and complete jobs he had contracted. This was strictly in confidence to the Celotex Corporation. Since this information was reported to us, it has evidently been relayed through management back to the Sellerbach people and Mr. Fox. However, he is still purchasing Blue Diamond 5/8" from them.

Tacoma Drywall Supply is an exclusive Celotex account at the present time. We have shipped a total of eleven cars of [redacted] to this account in July and have six on order for the first week of August. With this new corporation consisting of Don Fox, Jerry Crabee, and Tom Mascelli, three large Tacoma drywall contractors, we will be in a position to maintain an increase our volume. Our present "watch and wait" policy is probably sound on a national basis, but I do believe we need flexibility to meet and compete and even beat competition on local and individual basis as the situation demands.

CELOTEX 323433

Jack Curran
Seattle

cc: Don Gilmer

[redacted]
61-220

July 27, 1966

CEL 6587

TACOMA DRYWALL SUPPLY
Lakeview, Washington
5/8" Type X Wallboard

D W Miller
Tampa

cc: W G Lane Los Angeles District

You received a copy of Jack Curran's letter of July 25th regarding the 5/8" X hour Firestop Board price to Tacoma Drywall.

What Curran says is basically the same as I have reported to you in letter, teletype and telephone over the past two months. Curran, of course, is wrong in his statement that our management enlarged information given to us by Tacoma Drywall back to Wm. Fleming, Zellerbach Paper, and Fox Drywall. I have informed Curran that we have not and cannot have any contact with a competitive manufacturer.

I have been in personal contact with Jerry Croker, principal owner of Tacoma Drywall Supply. I am certain that the facts as I have presented to you in the past are true. That is that Fox Drywall have a protected price of $76.50 on a LCL Basis from Zellerbach. This price is for 500,000 feet of work contracted by Fox prior to the price change. This was proven by copies of invoices sent to you with a previous letter. I also know that Tacoma Drywall have a firm price offer of $70.75 (the old 5/8" Type X price) for 1,000,000 feet of 5/8" board on contract by Lakes Drywall from a competitive manufacturer. Even with this information you still continue to say "No" to my requests to meet this price competition with Tacoma Drywall.

Tacoma Drywall have been a 100% loyal Celotex account. Because we helped them get established in business they would rather buy from us than a competitive manufacturer. However, as they state their separate contracting company, Lakes Drywall, cannot lose money or go broke because Tacoma Drywall must pay us $76.50 rather than $70.75 for 5/8" board. In other words we have a last chance to meet this price. If not Tacoma Drywall and Lakes Drywall will be forced to buy from a competitor.

I have about exhausted every possibility to prove to you that a competitive price does exist with Fox Drywall, Zellerbach and Tacoma Drywall. It is my honest opinion that a final "NO" answer will mean we will lose Tacoma Drywall Supply, a $200,000 per year account. The Oakland District cannot afford to lose this account.

Once more your consideration and help. I have received your teletype #101: I believe the copies of invoices from Zellerbach to Fox dated June 7th should prove the price exception. The only other way to prove this would be to have Tacoma Drywall to buy from a competitive manufacturer. If they do this they will not give us evidence and we will have lost the account.

bcc: Jack Curran

J T Malcom

JTM:mfm

CELOTEX 323428

[redacted]
61-221

[redacted]
CC TO [redacted]

CEL 6586

HAVE DISCUSSED CONTENTS OF WILSON'S LETTER RE TACOMA DRYWALL SUPPLY
WITH MANAGEMENT UNLESS YOU CAN FURNISH EVIDENCE THAT ZELLERBACH PAPER
OR TACOMA DRYWALL SUPPLY CAN NOW PURCHASE GYPSUM BOARD FROM USG KAISER
OR BLIEDEN AROUND AT A DEVIATION OF OUR PUBLISHED PRICE AS ALLEGED
WE CANNOT APPROVE ANY ALLOWANCES
SUGGEST WILSON OR BLAZE SEE THE ACCOUNT AT ONCE AND CONVINCE THEM THAT
WE ARE NOW COMPETITIVE WITH BAJON MANUFACTURERS

CELOTEX 323427

BEST COPY AVAILABLE

GX-250

Mr. Forrest's portion being 8% of 39 Plaster ok. Ck Mr. Custer from de field calls + Mr Forrest report this Mr. Forrest Nat'l Gyp is presently marketing a line of Pal at Southard to be listed in future Bulletin + prices same as our differential to reg offices. Hett 9/3

TO: 2147-10 - Mr. R. A. Weisel September 4, 1964

FROM: 2147-17 - Mr. J. P. O'Brien

SUBJECT:

National either has or will shortly have a product similar to our WR. Their FOB mill base will be competitive to ours. Their manufacturing and shipping points will match ours. Equalized freight will be added to the mill price. The equalized freight to be calculated from either the National or competitive mill making the rate.

JPO'B/hk

GX-250

Jn O'Brien - 8/29 -
Natl's Medicine Lodge
fob prices on board
products are same as ours
on all bids at Southard, S.W. ok
Therefore, we would
equalize with them on items
sold on "Infant + 1st" basis -
2d & when they ship
such a product, their
P/A or green bulletin prices
in order.
??? Atwell

[redacted]
61-341

CONFIDENTIAL

GEORGIA-PACIFIC

INTERDEPARTMENTAL COMMUNICATION

DATE September 11, 1965

TO Mr. R. A. McCaskill

LOCATION Paoli

FROM Mr. J. S. Hale--pj

LOCATION Eastern Region

SUBJECT PRICE INCREASE

CC: Mr. H. Powers - Paoli

We are finding reports such as the attached coming in, particularly from Southern California and Northern California. I will try to keep you advised, but every effort should be exerted at your level to see if we can't get these cleared up, or else the price increase will not hold.

[redacted]
61-341

Bestwall Gypsum Company

FOR [redacted] DATE 9/10/65 FROM L.A. AREA OFFICE OFFICE

ATTENTION OF Mr. Bill Hale SUBJECT Price Raise - 5/8" Type X Board

ANSWERING YOURS DICTATED BY H. Unruh

[redacted] HOLD THE PRICE LINE, WITH NO PROTECTION OF JOBS, ON THE SHEETROCK MATERIAL, AND ALREADY HEARD TO DENIES BASIS TO ME THAT KAISER, NATIONAL AND USG HAVE PRICE PROTECTION IN THE MARKET. I WILL TRY TO GET AS MUCH ACCURATE INFORMATION FOR YOU ON THIS MATTER, BUT IT WILL TAKE A LITTLE WHILE FOR THE FULL STORY TO COME OUT.

I PICKED UP THE FOLLOWING INFORMATION IN THE FIELD YESTERDAY, ON JOB PROTECTION:

1. Both National and Kaiser have protected jobs for Sam Jackson of Ryland. The Kaiser man even told Sam of a 130,000 ft. apt. job that they have protected and on which they wanted him to supply the material.
2. Jim Wentz reported to me that Sidney Sweeney of South Coast Supply, our dealer, told him that National Gypsum had protected a 3 story office building thru a competitors of his--namely Russell of Ventura County Wallboard.
3. Jim Brooks reported to me Heartland Bldg. Materials in San Diego has price protection on jobs in that area with USG.

As I pick up information, I will pass it on to you. This is being so that in the future we might be able to follow a more realistic policy when price increases go into effect.

See file
JR 6 apt - 114 Gg no price protection
JH 9/13 Kaiser - Stanley from no price protection

033465

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